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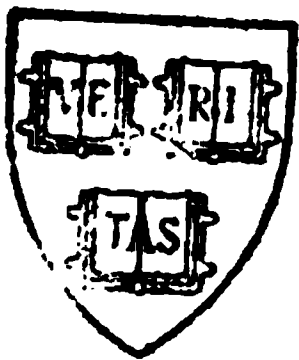
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Vol. 119—N. Y. Court
of Appeals.

1	348
146 1214	129 1244
128 3 91	131 2159
24	135 3384
L133 2514	357
28	128 1206
137 2408	180 1 9
140 3615	145 1506
141 3546	130 -661
126 5200	427
54	119 2642
135 1226	450
136 1167	121 2342
101	459
125 2534	136 2811
145 4443	121 3449
127 8515	20
109	129
146 1339	493
131	119 1505
121 1660	119 1508
137	123 1001
135 2656	502
153	123 1637
135 4633	142 5304
156	515
119 1630	142 3278
166	522
119 1418	127 328
175	125 12
129 1372	133 149
188	138 512
142 1 34	139 470
128 3107	120 3133
123 4644	557
124 4425	119 -654
124 4658	579
195	119 2586
126 2327	128 5300
204	580
129 1382	119 1569
212	587
134 1839	140 1347
136 1407	592
137 1176	122 1080
124 2588	b 603
d125 2198	120 681
221	128 169
122 1874	128 170
142 1445	136 530
226	604
140 4 10	119 -606
263	620
123 3 65	124 1 81
141 3106	122 2453
119 -684	623
274	133 2651
122 262	a 626
136 151	142 515
280	a 653
d133 4486	123 5
298	
128 1626	
316	
132 2 82	
a137 2592	
d143 2527	
334	
128 641	
141 591	

Vol. 119. NEW YORK REPORTS.

Cited in the following series:

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1:80 Fed 649 8 LRA 258 11 LRA 712n	147:10 LRA653n 21 LRA 79n 25 LRA 665n	263:9 LRA 440 17 LRA 193n 23 LRA 93 29 LRA 96n 32 LRA 769n	459:12 LRA 148 29 LRA 686n 30 LRA 555	69:14 LRA459n 14 LRA 485 34 LRA 426 35 LRA 575n 39 LRA 457n
37:12 LRA 603	160:30LRA 471n	280:33 LRA 832	468:60 Fed 375 78 Fed 100 8 LRA 139n	580:36 LRA473n 39 LRA 307n
46:76 Fed 669 83 Fed 38 84 Fed 399 85 Fed 264 85 Fed 291 12 LRA 754n 13 LRA 775 39 LRA 300	175:14 LRA 651 188:45 Fed 495 168 Mas 504 195:12 LRA 796 26 LRA 570n 212:19 LRA 141 39 LRA 76n	344:24 LRA508n 357:55 Fed 266 10 LRA 679n 17 LRA 329n 34 LRA 72	25 LRA 771 25 LRA 320n 35 LRA 141 475:11 LRA625n 515:67 Con 207	587:160 US 388 40 LEd 467 19 LRA 105n 592:9 LRA 549 13 LRA 633n
54:152 US 616 38 LEd 572 17 LRA 459 21 LRA 323n 23 LRA 313n	221:156 Mas 226 226:9 LRA 716n 9 LRA 807n 10 LRA 196n 16 LRA 684n 18 LRA 590n 19 LRA 197n	368:8 LRA 382n 380:164 Mas 281 19 LRA 702 399:20 LRA 862 34 LRA 767	522:20 LRA 501 536:36 LRA335n 540:78 Fed 786 8 LRA 795n 10 LRA 840n 39 LRA 815	598:13 LRA312n 603:9 LRA 720 14 LRA 138 14 LRA 372n 18 LRA 392 18 LRA 769
91:18 LRA 278n	20 LRA 55 23 LRA 484 32 LRA 383 34 LRA 416 36 LRA 593n 38 LRA 167n 39 LRA 586	423:38 LRA 700 441:12 LRA229n 35 LRA 418n 37 LRA 606n 450:60 Fed 692 81 Fed 800 14 LRA 283n	550:64 Con 366 8 LRA 552n 19 LRA 35n 27 LRA 811 561:51 Fed 301 83 Fed 434 565:24 LRA763n	609:12 LRA463n 623:10 LRA523n 650:34 LRA403n
101:20 LRA392n 22 LRA 808n	256:27 LRA405n			
109:28 LRA 818				
117:146 US 678 36 LEd 1131 17 LRA 611n				
137:16 LRA732n 20 LRA 153n				

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27 30

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS OF JANUARY 14, 1890, TO AND
INCLUDING DECISIONS OF MARCH 21, 1890,

WITH

NOTES, REFERENCES AND INDEX.

By H. E. SICKELS,
STATE REPORTER.

VOLUME CXIX.

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TABLE OF CASES

REPORTED IN THIS VOLUME.

A.		PAGE.		PAGE.	
<i>Acker v. Town New Castle</i>	631	<i>Brady, Phelan v.</i>	587		
<i>Adams, Goodyear v.</i>	650	<i>Brayton v. Sherman</i>	623		
<i>Akin v. Kellogg</i>	441	<i>Brooklyn, City of, Calvin v.</i>	630		
<i>Alley, Beadleston v.</i>	659	<i>Brooklyn, City of, Danaher v.</i> ..	241		
<i>Amsterdam Water Comrs., In re</i>		<i>Brooklyn, City of, Harrigan v.</i> ..	156		
<i>Clark v.</i>	629	<i>Brooklyn E. R. Co., Taylor v.</i>	561		
<i>Attica, Town of, Wrought Iron</i>		<i>Brooklyn L. Ins. Co., Baxter v.</i>	450		
<i>Bridge Co. v.</i>	204	<i>Brown, Dobbins v.</i>	188		
<i>Attrill, Raht v.</i>	628	<i>Buell v. Van Camp</i>	160		
B.		<i>Bulger v. Rosa</i>	459		
<i>Bachran v. Von Raden</i>	614	<i>Bull, Ledyard v.</i>	62		
<i>Bacon v. Haines</i>	639	<i>Bullock v. Oppmann</i>	637		
<i>Bajus v. S. B. & N. Y. R. R. Co.</i>	651	<i>Burchell v. Osborne</i>	486		
<i>Ballin v. Haines</i>	639	<i>Burrows, Glenn v.</i>	660		
<i>B. & M. Tel. Co., F. L. & T.</i>		<i>Bushwick C. Works, First Nat.</i>			
<i>Co. v.</i>	15	<i>Bk. Marietta v.</i>	645		
<i>Bartlett v. Sutorius</i>	660	<i>Byrnes, Tracey v.</i>	644		
<i>Baxter v. Brooklyn L. Ins. Co.</i> ..	450	C.			
<i>Beadleston v. Alley</i>	659	<i>Calvin v. City of Brooklyn</i>	630		
<i>Beal v. N. Y. C. & H. R. R. R. Co.</i>	635	<i>Carpenter, Yates Co. Nat. Bk. v.</i>	550		
<i>Beinhauer v. Gleason</i>	658	<i>Carr v. Rischer</i>	117		
<i>Bell, People ex rel. Stapleton v.</i>	175	<i>Carter, People ex rel. Warren v.</i>	557		
<i>Bent v. Bent</i>	625	<i>Carter, People ex rel. Warren v.</i> ..	654		
<i>Berford v. Wetmore</i>	638	<i>Casserly v. Witherbee</i>	522		
<i>Biow, Rutherford v.</i>	606	<i>Central Nat. Bk. of Troy, Hol-</i>			
<i>Blye, Corn Exchange Bk. Chi-</i>		<i>lister v.</i>	634		
<i>cago v.</i>	414	<i>Central Nat. Bk. of Troy, Ouder-</i>			
<i>Bd. Suprs. Erie Co. v. Jones</i> ...	339	<i>kirk v.</i>	263		
<i>Bd. Suprs. Jefferson Co.,</i>		<i>Champion, Town of, Maxim v.</i> ..	626		
<i>Strough v.</i>	212	<i>Chapman, Finlay v.</i>	404		
<i>Bd. Suprs. Rensselaer Co.,</i>		<i>Chauncey, In re Acctg.</i>	77		
<i>Hill v.</i>	344	<i>Church of St. Monica v. Mayor,</i>			
<i>Bd. Suprs. Rensselaer Co., People</i>		<i>etc., N. Y.</i>	191		
<i>ex rel. Vaughan v.</i>	636	<i>Citizens' Nat. Bk. Freeport v. I.</i>			
<i>Bd. Suprs. Westchester Co.,</i>		<i>& T. Nat. Bk. N. Y.</i>	195		
<i>People ex rel. McGrath v.</i> ..	126	<i>City of Brooklyn, Calvin v.</i>	630		
<i>Bonnie, Schoonmaker v.</i>	565	<i>City of Brooklyn, Danaher v.</i> ...	241		
<i>Boyd, Prochoronick v.</i>	641	<i>City of Brooklyn, Harrigan v.</i> ..	156		

TABLE OF CASES REPORTED.

	PAGE.	E.	PAGE.
<i>City of Troy, Kane v.....</i>	640	<i>Eagle Pencil Co., Oszkoecil v....</i>	631
<i>City of Troy, Magee v.....</i>	640	<i>Erhardt, Donnegan v.....</i>	468
<i>Clark, In re Acctg.....</i>	427	<i>Erie Co. Bd. Suprs. v. Jones... </i>	439
<i>Clark, In re, v. Water Comrs.</i>			
<i>Amsterdam.....</i>	629	F.	
<i>Cochran v. Wiechers</i>	399	<i>Fanning v. Vrooman.....</i>	658
<i>Cohu v. Husson.....</i>	609	<i>F. L. & T. Co. v. B. & M. Tel.</i>	
<i>Coleman, People ex rel. Dar-</i>		<i>Co</i>	15
<i>row v.....</i>	137	<i>Feitner v. Lewis</i>	181
<i>Colwell v. Garfield Nat. Bk....</i>	408	<i>Fifth Nat. Bk. Providence v.</i>	
<i>Consalus v. McConihie</i>	652	<i>Navassa Phosphate Co.....</i>	256
<i>Consolidated El. L. Co., Teall v.</i>	654	<i>Finlay v. Chapman.....</i>	404
<i>Cook v. N. Y. C. & H. R. R. R.</i>		<i>Finney v. Gallaudet.....</i>	661
<i>Co.....</i>	653	<i>First National Bk. Jersey City,</i>	
<i>Cooke v. L. & S. Mfg. Co.....</i>	607	<i>Lynch v.....</i>	635
<i>Corn Exchange Bk. Chicago v.</i>		<i>First Nat. Bk. Marietta v. Bush-</i>	
<i>Blye</i>	414	<i>wick C. Works.....</i>	645
<i>Costello v. Second Ave. R. R. Co.</i>	636	<i>Fitch v. Mayor, etc., N. Y.....</i>	608
<i>Condrey, Ward v.....</i>	614	<i>Florence, In re Will of.....</i>	661
<i>Crosby v. Prest., etc., D. & H.</i>		<i>French, People ex rel. Hogan v.</i>	493
<i>C. Co</i>	334	<i>French, People ex rel. McAleer</i>	
<i>Cullen, In re, to Vacate Assessment,</i>	628	<i>v.....</i>	502
D.		<i>French, People ex rel. Sheridan v.</i>	630
<i>Daland, Good v.....</i>	153	G.	
<i>Dalzell v. L. I. R. R. Co.....</i>	626	<i>Gallaudet, Finney v.....</i>	661
<i>Danaher v. City of Brooklyn... </i>	241	<i>Garfield Nat. Bk., Colwell v... </i>	408
<i>Darrow, People ex rel., v. Cole-</i>		<i>Garland v. Rome, W. & O. R. R.</i>	
<i>man</i>	137	<i>Co</i>	644
<i>Davis v. Rome, W. & O. R. R.</i>		<i>Garrison v. Rome, W. & O. R. R.</i>	
<i>Co.....</i>	644	<i>Co</i>	644
<i>Day, McCreery v.....</i>	1	<i>Genet v. Prest., etc., D. & H. C.</i>	
<i>Dayton, Meeker v.....</i>	654	<i>Co.....</i>	645
<i>Dean v. Met. E. R. Co.....</i>	540	<i>Gerdau, Soltau v.....</i>	380
<i>Del. & H. Canal Co., Prest., etc.,</i>		<i>Getman v. Ingersoll.....</i>	611
<i>Crosby v.....</i>	334	<i>Getman, Lacy v.....</i>	109
<i>Del & H. Canal Co., Prest., etc.,</i>		<i>Gilbert v. Lydecker</i>	611
<i>Genet v.....</i>	645	<i>Gilbert, Martin v.....</i>	298
<i>DeMott, Haines v.....</i>	632	<i>Gillen v. Tucker and C. C. Co... </i>	613
<i>Diefendorf, Vosburgh v.....</i>	357	<i>Gleason, Beinhauer v</i>	658
<i>Dobbins v. Brown.....</i>	188	<i>Glenn v. Burrows.....</i>	660
<i>Doherty v. Matsell.....</i>	646	<i>Gollner, Pickett v.....</i>	643
<i>Donnegan v. Erhardt.....</i>	468	<i>Good v. Daland.....</i>	153
<i>Dry Dock, E. B. & B. R. R. Co.,</i>		<i>Goodyear v. Adams.....</i>	650
<i>Weil v.....</i>	147	<i>Gowing v. Haines</i>	639
<i>Durston, People ex rel. Kemm-</i>		<i>Guthrie, Yates v.....</i>	420
<i>ler v</i>	569		

TABLE OF CASES REPORTED.

vii

H.		J.	
	PAGE.		PAGE.
<i>Haberstro, Radman v.</i>	659	<i>In re Mayr, etc., N. Y., to Com-</i>	
<i>Hager, Wildrick v.</i>	657	<i>pel Acctg. Simonson.</i>	660
<i>Haines, Bacon v.</i>	639	<i>In re Newton.</i>	637
<i>Haines, Ballin v.</i>	639	<i>In re Roe, to sell real estate.</i> ...	509
<i>Haines v. DeMott.</i>	632	<i>In re Rosenbaum, to Vacate</i>	
<i>Haines, Gowing v.</i>	639	<i>Assessment.</i>	24
<i>Haines, Knower v.</i>	639	<i>In re S. B. R. R. Co.</i>	141
<i>Haines, Whitman v.</i>	639	<i>In re Taylor, Acctg.</i>	28
<i>Hall, Taylor v.</i>	638	<i>In re Vanamee.</i>	646
<i>Harder, Talcott v.</i>	536	<i>In re Wagner, Estate of.</i>	28
<i>Harrigan v. City of Brooklyn.</i> ...	156	<i>In re Whitman, to Punish Schaf-</i>	
<i>Hart, Varnum v.</i>	101	<i>fer for Contempt.</i>	639
<i>Hauxhurst v. Ritch.</i>	621	<i>In re Wiley, Acctg.</i>	642
<i>Henderson v. Knick. Ice Co.</i>	619		
<i>Herman v. Roberts.</i>	37		
<i>Hesdra, In re will of.</i>	615		
<i>Hill v. Bd. Supers. Rensselaer</i>			
<i>Co.</i>	344		
<i>Hill, People v.</i>	603		
<i>Hodgkins v. Mead.</i>	166		
<i>Hogan, People ex rel. v.</i>			
<i>French.</i>	493		
<i>Holcomb v. Rice.</i>	598		
<i>Hollingsworth v. Moulton.</i>	612		
<i>Hollister v. Ceniral Nat. Bk.</i>			
<i>Troy.</i>	634		
<i>Hotis v. N. Y. C. & H. R. R. R.</i>			
<i>Co.</i>	627		
<i>Hubbard v. Nearpass.</i>	629		
<i>Hughes v. United Pipe Lines.</i> ...	423		
<i>Husson, Cohu v.</i>	609		
<i>Hyland v. Yonkers R. R. Co.</i> ...	612		
I.		K.	
<i>I. & T. Bank, N. Y., Citizen's</i>		<i>Kane v. City of Troy.</i>	640
<i>Bank of Davenport v.</i>	195	<i>Kellogg, Akin v.</i>	441
<i>Ingersoll, Getman v.</i>	611	<i>Kemmler, People v.</i>	580
<i>In re Chauncey, Acctg.</i>	77	<i>Kemmler, People ex rel., v.</i>	
<i>In re Clark, Acctg.</i>	427	<i>Durston.</i>	569
<i>In re Clark v. Water Comrs.</i>		<i>King v. Walbridge.</i>	657
<i>Amsterdam.</i>	629	<i>Knick. Ice Co., Henderson v.</i>	619
<i>In re Cullen, to Vacate Assess-</i>		<i>Knower v. Haines.</i>	639
<i>ment.</i>	628		
<i>In re Florence, Will of.</i>	661		
<i>In re Hesdra, Will of.</i>	615		
<i>In re Laney, Acctg.</i>	607		
<i>In re McKinney, Acctg.</i>	608		
		L.	
		<i>Lacy v. Getman.</i>	109
		<i>L. & G. Mfg. Co., Cooke v.</i> ...	607
		<i>Laney, In re. Acctg.</i>	607
		<i>Lanzandoen, People ex rel. v.</i>	
		<i>Schirmer.</i>	625
		<i>Larkin v. O'Neill.</i>	221
		<i>LaTourette, Richards v.</i>	54
		<i>Lawton v. Steele.</i>	226
		<i>Ledyard v. Bull.</i>	62
		<i>Lesser v. Williams.</i>	639
		<i>Lewis, Feitner v.</i>	131
		<i>L. I. R. R. Co., Dalzell v.</i>	626
		<i>L. I. R. R. Co., McKinney v.</i> ...	631
		<i>Lydecker, Gilbert v.</i>	611
		<i>Lynch v. First Nat. Bk. Jersey</i>	
		<i>City.</i>	635

M.

M.	PAGE.		PAGE.
McAlcer, People ex rel. v. French	502	Mayor, etc., N. Y., Phelan v...	86
McBride v. McBride.....	519	Mayor, etc., N. Y., Scholle v....	613
McConihie, Consalus v.....	652	Mayor, etc., N. Y., S. I. R. T.	
McCreery v. Day	1	R. R. Co. v.....	96
McCreery, Mayer v.....	434	Mead, Hodgkins v.....	166
McDonald v. Van Horne.....	651	Meeker v. Dayton.....	654
McGrath, People ex rel. v. Bd.		Met. E. R. Co., Dean v.....	540
Suprs. Westchester Co.	126	Miller v. Rinehart.....	368
McKinney v. L. I. R. R. Co....	631	Moulton, Hollingsworth v.....	612
McKinney, In re Acctg.....	608	Munro v. Smith.....	630
McMillin, Pittsburgh Carbon		Mut. L. Ins. Co. of N. Y. v.	
Co. (Limited) v.....	46	Shipman	324
Mages v. City of Troy.....	640		
Mandeville v. Newton.....	10	N.	
Martin v. Gilbert.....	298	Navassa P. Co., Fifth Nat. Bk.	
Matsell, Doherty v.....	646	Providence v.....	256
Matter of Chauncey, Acctg....	77	Nearpass, Hubbard v.....	629
Matter of Clark, Acctg.....	427	Newcastle, Town of, Acker v....	631
Matter of Clark v. Water Comrs.		Newton, In re.....	637
Amsterdam	629	Newton, Mandeville v.....	10
Matter of Cullen, to Vacate As-		N. Y. C. & H. R. R. R. Co.,	
essment	628	Beal v.....	635
Matter of Florence, Will of....	661	N. Y. C. & H. R. R. R. Co.,	
Matter of Hesdra, Will of.....	615	Cook v.....	653
Matter of Laney, Acctg.....	607	N. Y. C. & H. R. R. R. Co.,	
Matter of McKinney, Acctg.....	608	Hotis v.....	627
Matter of Mayor, etc., N. Y. to		N. Y., L. & W. R. Co., Ottenot v.	608
Compel Acctg., Simonson	660	N. Y. L. I. & T. Co., Rogers v.,	653
Matter of Newton.....	637	N. Y. L. & W. W. Co. v.	
Matter of Roe, to Sell Real		Schneider.....	475
Estate.....	509	N. Y., Mayor, etc., Church of	
Matter of Rosenbaum, to Vacate		St. Monica v.....	91
Assessment.....	24	N. Y., Mayor, etc., Fitch v.....	608
Matter of S. B. R. R. Co.....	141	N. Y., Mayor, etc., In re., to Com-	
Matter of Taylor, Acctg.....	28	pel Acctg., Simonson.....	660
Matter of Vanamee	646	N. Y., Mayor, etc., Phelan v....	86
Matter of Wagner, Estate of...	28	N. Y., Mayor, etc., Scholle v....	613
Matter of Whitman, to Punish		N. Y., Mayor, etc., S. I. R. T.	
Schaffer for Contempt.....	639	R. R. Co. v.....	96
Matter of Wiley, Acctg.....	642	N. Y. & R. C. Co., Sullivan v....	348
Maxim v. Town of Champion...	626	N. Y. Rubber Co. v. Rothery....	633
Mayer v. McCreery.....	434	Nostrand, People ex rel., v.	
Mayor, etc., N. Y., Church of		Wilson	515
St. Monica v.....	91		
Mayor, etc., N. Y., Fitch v.....	608	O.	
Mayor, etc., N. Y., In re., to		O'Neill, Larkin v.....	221
Compel Acctg., Simonson.....	660	Oppman, Bullock v.....	637

TABLE OF CASE REPORTED.

ix

	PAGE.		PAGE.
Osborne, Burchell v.....	486	Rensselaer Co. Bd. Suprs., Hill v.	344
O. S. N. Y. G. L. Co., Jansen v.	652	<i>Rensselaer Co. Bd. Suprs., Peo-</i>	
Ozkoecil v. Eagle Pencil Co.....	631	<i>ple ex rel. Vaughan v.....</i>	636
Ottenot v. N. Y., L. & W. R. Co..	603	Rice, Holcomb v.....	598
Ouderkirk v. Central Nat. Bk.		Richards v. LaTourette.....	54
Troy.....	263	Rinehart, Miller v.....	368
		Rischer, Carr v.....	117
P.		<i>Ritch, Hauzhurst v.....</i>	621
<i>People v. Hill.....</i>	603	Roberts, Herman v.....	37
People v. Kemmler.....	580	Roe, In re., to Sell Real Estate,	509
<i>People v. Price.....</i>	650	Roe v. Strong.....	316
People ex rel. Darrow v. Cole-		<i>Rogers v. N. Y. L. I. & T. Co..</i>	653
man	137	<i>Rome, W. & O. R. R. Co., Davis v.</i>	644
People ex rel. Hogan v. French,	493	<i>Rome, W. & O. R. R. Co., Gar-</i>	
People ex rel. Kemmler v. Durs-		<i>land v.....</i>	644
ton	569	<i>Rome, W. & O. R. R. Co., Gar-</i>	
<i>People ex rel. Linzandoen v.</i>		<i>rierson v.....</i>	644
<i>Schirmer.....</i>	625	Rosa, Bulger v.....	459
People ex rel. McAleer, v.		Rosenbaum, In re., to Vacate As-	
French	502	essment.....	24
People ex rel. McGrath v. Bd.		<i>Rothery, N. Y. Rubber Co. v....</i>	633
Suprs. Westchester Co.....	126	Routledge v. Worthington Co..	592
People ex rel. Nostrand v.		<i>Rutherford v. Bino.....</i>	606
Wilson	515	<i>Rutherford v. Schattman.....</i>	604
<i>People ex rel. Sheridan v. French,</i>	630		
People ex rel. Stapleton v. Bell,	175	S.	
<i>People ex rel. Vaughan v. Bd.</i>		Salina, Town of, Wells v.....	280
<i>Suprs. Rensselaer Co</i>	636	<i>Schaffer, In re Whitman, to Pun-</i>	
People ex rel. Warren v. Carter,	557	<i>ish for Contempt</i>	639
<i>People ex rel. Warren v. Carter..</i>	654	<i>Schattman, Rutherford v.....</i>	604
<i>Peterson v. Swan.....</i>	662	<i>Schirmer, People ex rel. Lanza-</i>	
Phelan v. Brady.....	587	<i>doen v.....</i>	625
Phelan v. Mayor, etc., N. Y....	86	Schneider, N. Y. L. & W. W.	
Phoenix M. L. Ins. Co., Wy-		Co. v.....	475
man v.....	274	<i>Scholle v. Mayor, etc., N. Y....</i>	613
<i>Pickett v. Gollner.....</i>	643	Schoonmaker v. Bonnie.....	565
Pittsburg Carbon Co. (Limited)		<i>Second Ave. R. R. Co., Costello v.</i>	636
v. McMillin.....	46	<i>Sheridan, People ex rel. v. French,</i>	630
Prest. etc., D. & H. C. Co.,		<i>Sherman, Brayton v.....</i>	623
Crosby v.....	334	Shipman, Mut. L. Ins. Co. of	
<i>Prest., etc., D. & H. C. Co.,</i>		N. Y. v.....	324
<i>Genet v.....</i>	645	Shorer v. Times P. & P. Co....	483
<i>Price, People v.....</i>	650	<i>Simonson, In re Mayor, etc.,</i>	
<i>Prochownick v. Boyd.....</i>	641	<i>N. Y. to Compel Acctg. of.....</i>	660
		<i>Smith, Munro v.....</i>	630
R.		Soltau v. Gerdau.....	380
<i>Radman v. Haberstro.....</i>	659	S. B. R. R. Co., In re	141
<i>Raht v. Attrill.....</i>	628	Stapleton, People ex rel., v. Bell,	175
SICKELS—VOL. LXXIV.		B	

TABLE OF CASES REPORTED.

	PAGE.		PAGE.
S. I. R. T. R. R. Co. v. Mayor, etc., N. Y.....	96	Vaughan, People ex rel., v. Board Suprs. Rensselaer Co.....	636
Steele, Lawton v.....	226	Von Raden, Bachran v.....	614
Stimmel, Thurber v.....	641	Vosburgh v. Diefendorf.....	357
Strong, Roe v.....	316	Vrooman, Fanning v.....	658
Strough v. Bd. Suprs. Jefferson Co.....	212		
Strough v. Wilder.....	530	W.	
Sullivan v N. Y. & R. C. Co...	848	Wagner, In re Estate of.....	28
Sutorius, Bartlett v.....	660	Walbridge, King v.....	657
Swan, Peterson v.....	662	Ward v. Cowdrey.....	614
S. B. & N. Y. R. R. Co., Bajus v.	651	Warren, People ex rel., v. Carter.	557
		Warren, People ex rel., v. Carter.	654
T.		Water Comrs. Amsterdam, In re Clark v.....	629
Talcott v. Harder.....	536	Weil v. D. D., E. B. & B. R. R. Co.....	147
Taylor v. Brooklyn E. R. Co.....	561	Wells v. Town of Salina.....	280
Taylor v. Hall.....	638	Werner v. Tuch.....	632
Taylor, In re., Acctg.....	28	West v. Van Tuyl.....	620
Teall v. Consolidated El. L. Co..	654	Westchester Co. Board Suprs., People ex rel. McGrath v....	126
Thurber v. Stimmel.....	641	Wetmore, Bedford v.....	638
Times P. & P. Co., Shorer v...	483	Whitman, In re to Punish Shaffer for contempt.....	639
Town of Attica, Wrought Iron B. Co. v.....	204	Whitman v. Haines.....	639
Town of Champion, Maxim v...	626	Wiechers, Cochran v.....	399
Town of New Castle, Ackerv...	631	Wilder, Strough v.....	530
Town of Salina, Wells v.....	280	Wildrick v. Hager.....	657
Tracey v. Byrnes.....	644	Wiley, In re Acctg.....	642
Troy, City of, Kane v.....	640	Williams, Lesser v.....	639
Troy, City of, Magee v.....	640	Wilson, People ex rel. Nos- trand v.....	515
Tuch, Werner v.....	632	Witherbee, Casserly v.....	522
Tucker and C. C. Co., Gillen v...	613	Worthington Co., Routledge v.	592
		Wrought Iron B. Co. v. Town of Attica.....	204
U.		Wyman v. Phoenix Mut. L. Ins. Co.....	274
United Pipe Lines, Hughes v...	423		
		Y.	
V.		Yates v. Guthrie.....	420
Vanamee, In re.....	646	Yates Co. Nat. Bk. v. Carpenter.	550
Van Camp, Buell v.....	160	Yonkers R. R. Co., Hyland v....	612
Van Horne, McDonald v.....	651		
Van Tuyl, West v.....	620		
Varnum v. Hart.....	101		

TABLE OF CASES

CITED IN THE OPINIONS REPORTED IN THIS VOLUME.

A.		PAGE.
Aldrich v. Reynolds.....	1 Barb. Ch. 618.....	600
Allen v. Jaquish.....	21 Wend. 688.....	9
Andrews v. Rowan.....	28 How. Pr. 126	553, 554
Anonymous	6 Cow. 41	485
Anthony v. Adams	1 Met. 284.....	292
Armitage v. Mace.....	96 N. Y. 538	549
Ashby v. White	8 State Trials, 89, 180	186
Assn. for Colored Orphans v. Mayor, etc., N. Y.	38 Hun, 593; 104 N. Y. 581...94,	95
Atty.-Gen. v. Corpn. Lichfield.....	36 Eng. Ch. R. 546.....	296
B.		
Babbitt v. Bowen.....	32 Vt. 487.....	72
Babcock v. City of Buffalo	56 N. Y. 268	289
Babcock v. Goodrich.....	3 How. Pr. [N. S.] 53.....	115
Bagley v. Bowe.....	105 N. Y. 171	464
Bailey v. Bidwell	13 M. & W. 74	365
Bailey v. Hollister	26 N. Y. 112	408
Baines v. Swainson	4 B. & S. 270.....	394
Bakeman v. Talbot	31 N. Y. 366, 370	43, 45
Baker v. Baker	6 H. of L. Cas. 616	85
Ballard v. Tomlinson.....	L. R. (29 Ch. Div.) 115	255
Ballou v. Cunningham	60 Barb. 425.....	527
Bank British N. A. v. Mercantile Nat. Bk.....	91 N. Y. 111.....	201
Bank of Orleans v. Flagg.....	3 Barb. 818.....	592
Barclay v. Comm.....	25 Penn. St. 503	239
Barhyte v. Shepherd	35 N. Y. 255.....	518
Barker v. People.....	3 Cow. 686	233
Bassett v. Spofford.....	45 N. Y. 387.....	339
Batterman v. Pierce.....	3 Hill, 171.....	597
Bayard v. Malcolm	1 J. R. 467	42
Beach v. Cook.....	28 N. Y. 508.....	529
Bean v. Tonnele	94 N. Y. 381.....	610
Beck v. Carter.....	68 N. Y. 383.....	225
Becker v. Boon	61 N. Y. 317.....	564
Bennett v. R. R. Co.....	102 U. S. 577.....	225
Bertles v. Nunan	92 N. Y. 152.....	546
Bevan v. Cooper.....	72 N. Y. 317, 328.....	36

TABLE OF CASES CITED.

	PAGE.
Birkett v. K. I. Co.....	110 N. Y. 506..... 153
Bishop of Winchester v. Paine.....	11 Vesey, 194..... 528
Blake v. Griswold.....	104 N. Y. 618..... 124
Bliss v. Greeley.....	45 N. Y. 671..... 42
Bd. Suprs. Richmond Co. v. Ellis...	59 N. Y. 620..... 292
Boast v. Firth	L. R. (4 C. P.) 1 114
Booth v. Coulton.....	L. R. (5 Ch. App.) 684..... 85
Bostwick v. Beach	103 N. Y. 414..... 330
Bowery Nat. Bk. v. Mayor, etc.....	63 N. Y. 336..... 90
Boyd v. Cedar R. Ins. Co.....	79 Ia. 325 457
Brackett v. Griswold.....	103 N. Y. 425..... 124
Bradley v. Angel	3 N. Y. 475.....58, 59
Bragelman v. Daue	69 N. Y. 69.....526, 527
Brazill v. Isham.....	12 N. Y. 9 481
Brehm v. Mayor, etc.....	104 N. Y. 186 159
Bridges v. Bd. Suprs. Sullivan Co...	92 N. Y. 570217, 218, 219
Brigg v. Hilton.....	99 N. Y. 517.....420, 597
Brown v. Clark.....	77 N. Y. 369 617
Brown v. Illius.....	27 Conn. 84 255
Brown v. N. Y. C. R. R. Co.....	34 N. Y. 404 474
Brown v. Perkins.....	12 Gray. 89237, 239
Bruecher v. Vil. Port Chester.....	101 N. Y. 240 560
Bulbrook v. Goodere.....	3 Burr. 1770..... 285
Burgess v. Abbott	1 Hill, 476..... 356
Burgett v. Fancher	35 Hun, 647 556
Burnham v. Nevins	144 Mass. 92..... 43
Butler v. Johnson.....	111 N. Y. 204 220
Byrd v. Byrd.....	44 Ga. 258..... 72

C.

Cagger v. Lansing.....	64 N. Y. 417.....417, 419
Caldwell v. N. Mohawk V. Bk.....	64 Barb. 333.....267, 272
Calmady v. Rowe.....	6 C. B. 861..... 323
Campbell v. Seaman.....	63 N. Y. 568.....417, 420
Carpenter v. Buller.....	8 M. & W. 209..... 314
Carpenter v. Stearns.....	32 Mo. App. 182..... 310
Carter v. Brooklyn L. Ins. Co.....	110 N. Y. 15..... 457
Carter v. John Hancock M. L. Ins. Co.	127 Mass. 153..... 457
Casamaijor v. Pearson.....	8 Clark & Fin. 100 83
Cavalli v. Allen.....	57 N. Y. 517..... 592
Chamberlain v. Martin	43 Barb. 607..... 527
Chambers v. Bull	1 Anst. 269..... 136
Chance v. Isaacs	5 Paige, 592..... 58
Chapin v. Dobson.....	78 N. Y. 74..... 597
Charles v. Hinckley Local Board....	52 L. J. [N. S.] 554 255
Charter v. Stevens.....	3 Denio, 33..... 526
Chase v. Lord.....	77 N. Y. 1..... 404

TABLE OF CASES CITED.

xiii

		PAGE.
Chegaray v. Mayor, etc.....	13 N. Y. 220.....	94
City of Memphis v. Brown.....	20 Wall. 289.....	7
Clafin v. Inhabts. Hopkington.....	4 Gray, 502.....	290
Clapp v. Hawley.....	97 N. Y. 610.....	156
Clark v. Gilbert.....	32 Barb. 576.....	114
Clift v. Moses.....	112 N. Y. 426.....	536
Clyde v. Rogers.....	87 N. Y. 625.....	408
Cocker v. F. H. & F. M. Co.....	3 Sum. 530.....	355
Coe v. Cassidy.....	72 N. Y. 133.....	527
Cohu v. Husson.....	113 N. Y. 662.....	610
Cole v. The State.....	102 N. Y. 48.....	211
Coleman v. Wade.....	6 N. Y. 44.....	479
Collins v. Bennett.....	46 N. Y. 490.....	267
Collins v. Ralli.....	20 Hun, 246; 85 N. Y. 637.....	392
Commrs. v. Clark.....	94 U. S. 278.....	367
Corcoran v. Holbrook.....	59 N. Y. 517.....	192
Corn Ex. Bk. v. Nassau Bk.....	91 N. Y. 74, 81.....	200
Cornell v. Town of Guilford.....	1 Denio, 510.....	292
Corwin v. N. Y. & E. R. R. Co.....	13 N. Y. 42.....	474
Coulter v. Bd. Education.....	63 N. Y. 366.....	89
Countess of Rutland's Case.....	Coke, Pt. V. 25 b.....	7
Cowing v. Altman.....	71 N. Y. 435, 443,.....	366, 367
Cox v. Jagger.....	2 Cow. 638.....	482
Crafter v. Met. Ry. Co.....	L. R. (1 C. P.) 300.....	225
Cromwell v. County of Sac.....	96 U. S. 51.....	367
Curtis v. Leavitt.....	15 N. Y. 9, 108.....	53
Curtis v. R. & S. R. R. Co.....	18 N. Y. 534.....	193
Cutter v. Mayor, etc.....	92 N. Y. 166.....	10
Cutting v. Marlor.....	78 N. Y. 454.....	267, 273

D.

Dakin v. Dunning.....	7 Hill, 30.....	564
Dalrymple v. Hillenbrand.....	62 N. Y. 5.....	366
Dalrymple v. Williams.....	63 N. Y. 361.....	172
Dearborn v. Cross.....	7 Cow. 48.....	9
Delaney v. Van Aulen.....	84 N. Y. 16.....	85
Delaware Bank v. Jarvis.....	20 N. Y. 226.....	14
Denise v. Denise.....	110 N. Y. 568.....	623
Dennerlein v. Dennerlein.....	111 N. Y. 518.....	24
DePuy v. Strong.....	37 N. Y. 372.....	357
Devlin v. Mayor, etc.....	63 N. Y. 14.....	114
Dewitt v. Brisbane.....	16 N. Y. 508.....	52
Dickinson v. City of Poughkeepsie..	75 N. Y. 65.....	297
Dickinson v. Mayor, etc.....	92 N. Y. 584.....	159
Dimes v. Petley.....	15 Ad. & El. 276.....	237
Diossy v. Morgan.....	74 N. Y. 11.....	305, 307, 315
Doe v. Ridgway.....	4 Barn. & Ald. 52.....	616

		PAGE
Dole v. Thurlow.....	12 Metc. 157.....	535
Drake v. Rogers.....	3 Hill, 604.....	45
Dudley v. Bolles.....	24 Wend. 471.....	618
Dunn v. Murray.....	9 B. & C. 780.....	481
Dwight v. Germania L. Ins. Co.....	108 N. Y. 341.....	464

E.

Eaton v. Balcom.....	88 How. Pr. 80.....	357
Eckerson v. Vollmer.....	11 How. Pr. 42.....	137
Eckhert v. Ellis.....	26 Hun, 664.....	367
Edgell v. Hart.....	9 N. Y. 213.....	464
Edmiston v. Brucker.....	40 Hun, 256.....	527
Elliott v. Wood.....	45 N. Y. 71.....	527
Ellis v. Thompson.....	8 M. & W. 445.....	355
Elwood v. W. U. T. Co.....	45 N. Y. 553.....	550
Ely v. Bd. Suprs.....	36 N. Y. 297.....	239
Erkenbach v. Erkenbach.....	96 N. Y. 456.....	521
Ex parte Mayon.....	4 DeG., J. & S. 664.....	465

F.

Fahy v. North.....	19 Barb. 341.....	114
Farmers' & C. Nat. Bk. v. Noxon...	45 N. Y. 762.....	364
Ferguson v. Smith.....	2 Johns. Ch. 139.....	135, 136, 137
Finch v. Finch.....	10 Ohio St. 501.....	381
First Nat. Bk. v. Green.....	43 N. Y. 298.....	364, 365
First Nat. Bk. v. Ocean Nat. Bk....	60 N. Y. 278.....	272
Fisher v. McGirr.....	1 Gray, 1.....	234, 239, 241
Fitzgerald v. Quann.....	109 N. Y. 441.....	547
Flash v. Conn.....	109 U. S. 871.....	404
Fleming v. Gilbert.....	8 J. R. 530.....	9
Foote v. Lathrop.....	53 Barb. 183.....	136
Ford v. Williams.....	24 N. Y. 359.....	464
Fort Plain Br. Co. v. Smith.....	30 N. Y. 44.....	237
Foster v. Essex Bank.....	17 Mass. 499.....	271
Foxwist v. Tremaine.....	2 Saund. 212.....	136
Fretwell v. McLemore.....	52 Ala. 124.....	72
Frost v. Inhabs. Belmont.....	6 Allen, 152.....	290
Frost v. White.....	14 La. Ann. 140.....	310

G.

Gage v. Vil. of Hornellsville.....	106 N. Y. 667.....	158
Garlick v. Strong.....	3 Paige, 440.....	331
Gilbert v. Sage.....	57 N. Y. 639.....	618
Gillet v. Moody.....	3 N. Y. 479.....	58
Glenney v. Stedwell.....	64 N. Y. 120-128.....	408
Goelet v. Spofford.....	55 N. Y. 647.....	156
Goetcheus v. Matthewson.....	61 N. Y. 420.....	187

TABLE OF CASES CITED.

XV.

		PAGE.
Goldsmid v. Turnbridge Wells I. Co.	L. R. (1 Eq. Cas.) 161.....	255
Gouverneur v. Lynch	2 Paige, 300.....	592
Graham v. D. & H. C. Co.....	46 Hun, 386.....	474
Gratacap v. Phyfe	1 Barb. Ch. 485.....	85
Graves v. Am. Exch. Bk.....	17 N. Y. 205.....	200
Gray v. Barton	55 N. Y. 68.....	89
Green v. Lippincott.....	53 How. Pr. 38	357
Greene v. Dingley.....	24 Me. 131	355
Griffith v. McCullum.....	46 Barb. 561.....	238
Grocers' Bk. v. Penfield	69 N. Y. 502.....	364
Gross v. Welwood	90 N. Y. 638.....	647
Grow v. Garlock.....	29 Hun, 598	633

H.

Hall v. Ditson	5 Abb. (N. C.) 198	527
Hanger v. City of Des Moines	52 Ia. 193	292
Harrower v. Ritson	37 Barb. 301.....	237
Hart v. Mayor, etc.....	9 Wend. 590	236, 238
Harvey v. Towers	4 Eng. L. & Eq. 531	365
Hathaway v. Town of Cincinnati..	62 N. Y. 484	217
Hawley v. James	5 Paige, 446.....	448
Hentz v. Miller.....	94 N. Y. 64	393
Herrick v. Smith	13 Hun, 446	613
Herrick v. Stover.....	5 Wend. 580.....	45
Hill v. Hobart.....	16 Me. 164.....	355
Hodgkins v. Mead	119 N. Y. 166.....	418
Hollingsworth v. Flint.....	101 U. S. 591	545
Holme v. Karsper.....	5 Binn. 469.....	365
Homer v. Guardn. Mut. L. Ins. Co..	67 N. Y. 483.....	280
Hone v. Van Schaick	7 Paige, 221, 223.....	450
Hooker v. Cummings	20 J. R. 100	234
Hotchkiss v. Germania F. Ins. Co...	5 Hun, 90	618
Howard v. Legg.....	11 N. E. 614.....	255
Howe v. Huntington.....	15 Me. 354.....	355
Howell v. City of Buffalo	15 N. Y. 512.....	158
Howell v. Mills.....	53 N. Y. 322.....	24
Howland v. Woodruff.....	60 N. Y. 73.....	391
Hoyt v. Dillon.....	19 Barb. 644.....	647
Hudson v. Plets	11 Paige, 180	553
Hundley v. Filbert.....	73 Mo. 34	311
Hunt v. Johnson.....	44 N. Y. 27....,	547
Hunt v. Mayor, etc.....	109 N. Y. 134.....	254
Huson v. Young.....	4 Lans. 64.....	45

I.

Ingersoll v. Bostwick	22 N. Y. 425	417, 419
In re Clark, Acctg.....	119 N. Y. 427.....	642
In re Clark v. Sheldon	106 N. Y. 104.....	216

		PAGE.
In re Eager	46 N. Y. 100.....	27
In re Emigrant Ind. S. Bk.....	75 N. Y. 388.....	27
In re Jacobs.....	98 N. Y. 98.....	234
In re Merriam	84 N. Y. 596.....	27
In re Voorhis.....	5 T. & C. 345; 62 N. Y. 637....	27

J.

Jackson v. Williamson	2 T. R. 281	174
Jenkins v. Putnam.....	106 N. Y. 272, 276.....	408
Jetter v. N. Y. & H. R. R. Co.....	2 Keyes, 162.....	474
Johnson v. Bush.....	3 Barb. Ch. 207.....	52
Johnson v. Carnley	10 N. Y. 570	417, 419
Jones v. New Haven.....	34 Conn. 13.....	255
Jones v. Seligman	81 N. Y. 190.....	474
Jordan v. Nat. S. & L. Bk.....	74 N. Y. 470	58, 59
Josey v. Rogers.....	13 Ga. 478.....	72
Judd L. & S. O. Co. v. Hubbell.....	76 N. Y. 543.....	420

K.

Kamp v. Kamp.....	59 N. Y. 212.....	521
Kavanagh v. Wilson.....	70 N. Y. 177.....	550
Ketchum v. City of Buffalo.....	14 N. Y. 366.....	293
King v. St. John Devizes.....	9 B. & C. 896.....	116
King v. Walbridge	48 Hun, 470.....	527
Kingsley v. First Nat. Bk.....	31 Hun, 329.....	109
Kinsey v. Leggett	71 N. Y. 387.....	391
Knapp v. Roche.....	82 N. Y. 369.....	155
Kromer v. Heim.....	75 N. Y. 574.....	9
Kunz v. City of Troy	104 N. Y. 344.....	153

L.

Langlois v. Buffalo & R. R. R. Co ..	19 Barb. 364.....	474
Larmore v. Crown Point I. Co.....	101 N. Y. 391, 395.....	225
Lattimore v. Harsen.....	14 J. R. 330.....	9
Lawrence v. Ocean Ins. Co.....	11 J. R. 241.....	355
Lawton v. Green.....	64 N. Y. 326.....	600
Leavitt v. Cruger.....	1 Paige, 422.....	136, 137
Lennon v. City of Newton.....	134 Mass. 476.....	292
Leonard v. Col. St. N. Co.....	84 N. Y. 48.....	417, 419
License Tax Case.....	5 How. (U. S.) 504.....	236
Lindsay v. Jackson	2 Paige, 581.....	58, 60
Littauer v. Goldman	72 N. Y. 506.....	14
Lockett v. Nicklin.....	2 Exch. 93.....	596
Lodie v. Arnold.....	2 Salk. 458	240
Long v. N. Y. C. R. R. Co.....	50 N. Y. 76.....	42
Loomis v. People	67 N. Y. 322.....	389
Losee v. Losee.....	2 Hill, 612.....	616

TABLE OF CASES CITED.

xvii

		PAGE.
Lothrop v. Foster.....	51 Me. 367.....	331
Lowry v. Inman	46 N. Y. 119, 126.....	402
Lucas v. Beebe	88 Ill. 427.....	310

M.

McCarthy v. City of Syracuse	46 N. Y. 194.....	253
McClintick v. Cummins.....	2 McLean, 98.....	365
McClure v. Niagara.....	3 Abb. Ct. App. Dec. 83	158
McDonald v. Mayor, etc.....	68 N. Y. 23.....	297
Mabbett v. White.....	12 N. Y. 442.....	468
Mangam v. Peck.....	111 N. Y. 401	547
Martin v. Kunzmuller.....	37 N. Y. 397.....	58
Marvin v. Smith.....	46 N. Y. 571.....	333
Marzetti v. Williams.....	1 B. & Adol. 41.....	202
Matter of Cottrell.....	95 N. Y. 329.....	617
Matter of Mayor, etc., N. Y.....	99 N. Y. 569.....	210
Matter of Neilley.....	95 N. Y. 386.....	220
Matter of N. Y. E. R. R. Co.....	70 N. Y. 327.....	578
Matter of Pepoon.....	91 N. Y. 255.....	617
Maxwell v. McAtee.....	9 B. Mon. 21.....	42
Mayor of Colchester v. Brooke.....	7 Ad. & El. 339.....	237
Mayor, etc., N. Y. v. Davenport	92 N. Y. 604.....	218
Mayor, etc., N. Y. v. Lyons	1 Daly, 296.....	420
Mayor, etc., v. Ray	19 Wall. 468.....	295
Mead v. Acton.....	139 Mass. 341.....	290
Mead v. Figh.....	4 Ala. 279.....	309
Mead v. Parker.....	111 N. Y. 262.....	355
Meeker v. Van Rensselaer	15 Wend. 397	236, 238
Menagh v. Whitwell.....	52 N. Y. 146.....	465
Merritt v. Walsh.....	32 N. Y. 685.....	357
Metr. Bd. Excise v. Barrie.....	34 N. Y. 666, 668	577
Miller v. Moses.....	56 Me. 128.....	311
Mills v. Van Voorhies.....	20 N. Y. 412.....	331
Milnes v. Mayor of Huddersfield....	(L. R. (10 Q. B. Div.) 124; 12 id. 443	250
Miner v. Beekman	11 Abb. (N. S.) 147, 160	529
Minick v. City of Troy.....	83 N. Y. 514.....	158
Minot v. Inhabts. Roxbury.....	112 Mass. 1.....	290, 292
Moran v. Chase.....	52 N. Y. 346.....	417, 420
Moran v. Long Island City	101 N. Y. 439.....	485
Moyer v. Hinman.....	14 N. Y. 184.....	592
Mugler v. Kansas.....	123 U. S. 661.....	234
Munger v. Albany City Nat. Bk....	85 N. Y. 580.....	58, 60
Munroe v. Cooper.....	5 Pick. 412.....	365
Munzo v. Wilson.....	111 N. Y. 295.....	550
Murray v. Usher.....	117 N. Y. 542.....	569
Myers v. Davis.....	22 N. Y. 492.....	58

TABLE OF CASES CITED.

N.		PAGE.
Nat. Bk. v. Spencer.....	19 Hun, 569	420
Nevins v. City of Peoria.....	41 Ill. 502	255
Newman v. Suprs. Livingston Co...	45 N. Y. 676.....	219
N. Y. Cable Co. v. Mayor, etc	104 N. Y. 1.....	662
N. Y. L. Ins. Co. v. U. L. Ins. Co...	88 N. Y. 424.....	485
Nickerson v. Ruger.....	76 N. Y. 279.....	364
Nolan v. Whitney.....	88 N. Y. 648.....	90
Noristown v. Moyer.....	67 Penn. St. 355	255
O.		
Ocean Nat Bk. v. Carll.....	55 N. Y. 440.....	364
Olcott v. Tioga R. R. Co.....	27 N. Y. 546.....	527
Onthank v. L. S. & M. S. R. R. Co..	71 N. Y. 194.....	48
Orleans v. Platt.....	99 U. S. 676	215
Ott v. Schroepfel.....	5 N. Y. 482.....	481
Ott v. Schroepfel.....	3 Barb. 56.....	482
P.		
Pantzar v. Tilly Foster I. M. Co	99 N. Y. 368.....	192
Parker v. Bd. Suprs. Saratoga Co...	106 N. Y. 392.....	294
Parsons v. Inabts. Goshen.....	11 Pick. 896	292
Patten v. Stitt.....	50 N. Y. 591.....	417
Pattison v. Syracuse N. Bk.	80 N. Y. 82.....	266, 267, 271
Payne v. Becker.....	87 N. Y. 158.....	330, 331
Peck v. N. Y. & N. J. R. Co	85 N. Y. 246.....	24
People v. Albany.....	11 Wend. 539.....	255
People v. Draper	15 N. Y. 532.....	578
People v. Gillson	109 N. Y. 389, 397	577
People v. Hagadorn.....	104 N. Y. 516.....	109
People v. Home Ins. Co.....	92 N. Y. 328, 344.....	577
People v. Kennedy.....	2 Park. Cr. R. 319.....	130
People v. King	110 N. Y. 418.....	577
People v. Morse	99 N. Y. 662.....	389
People v. Stout.....	3 Park. Cr. R. 670	585
People v. Suprs.....	43 N. Y. 130.....	578
People v. West	106 N. Y. 293.....	233
People ex rel. Bolton v. Albertson...	55 N. Y. 50, 54.....	577, 578
People ex rel. City Rochester v. Briggs	50 N. Y. 553, 558.....	577
People ex rel. Frey v. Warden, etc..	100 N. Y. 20.....	575
People ex rel. Genesee Co. Bk. v. } Olmsted.....	45 Barb. 644	518
People ex rel. Hart v. Bd. Fire } Comrs. N. Y.....	82 N. Y. 358.....	500
People ex. rel. Hays v. City of } Brooklyn	71 N. Y. 495.....	519
People ex rel. Hogan v. French.....	119 N. Y. 493.....	505, 506, 508

TABLE OF CASES CITED.

xix

	PAGE.
People ex rel. Jefferson v. Smith....	88 N. Y. 576..... 189
People ex rel. Judson v. Thacher....	55 N. Y. 525..... 188
People ex rel. Lincoln v. Bd. Assrs. } Barton	44 Barb. 148..... 518
People ex rel. McMaster v. Suprs. } Niagara Co.....	4 Hill, 20..... 518
People ex rel. Masterson v. French..	{ 110 N. Y. 494....496, 499, 500, 501 505, 506, 507
People ex rel. Oswald v. Goff.....	52 N. Y. 484.....417, 419
People ex rel. Post v. Suprs. } Ontario Co	4 Denio, 260..... 129
People ex rel. Rorke v. Bd. Assrs....	82 Hun, 457; 97 N. Y. 648..... 94
People ex rel. Smith v. Pease.....	27 N. Y. 45.....184, 186, 187
People ex rel. Smith v. Pease.....	30 Barb. 588..... 185
People ex rel. Swift v. Police } Comrs. N. Y.....	99 N. Y. 676..... 501
People ex rel. Tenth Nat. Bk. v. } Bd. Apportionment	64 N. Y. 627..... 517
People ex rel. Tweed v. Liscomb ...	60 N. Y. 559..... 575
People ex rel. Union Ins. Co. v. Nash,	111 N. Y. 310..... 478
People ex rel. Van Tassel v. Suprs. } Columbia Co	67 N. Y. 330..... 180
Pfohl v. Simpson	74 N. Y. 137..... 401
Phelan v. N. M. L. Ins. Co.....	118 N. Y. 147..... 457
Phillips v. Wooster.....	36 N. Y. 412..... 549
Pitt v. Lord Dacre.....	L. R. (3 Ch. Div.) 295..... 85
Pond v. Metr. El. R. R. Co.....	112 N. Y. 186..... 604
Pope v. Mead.....	99 N. Y. 201..... 330
Porter v. Smith.....	107 N. Y. 531. 624
Porter v. Williams.....	9 N. Y. 142..... 53
Prentice v. Geiger	74 N. Y. 342..... 45
Prouty v. L. S. & M. S. R. R. Co....	85 N. Y. 272..... 545
Purdy v. N. Y. & N. H. R. R. Co....	61 N. Y. 353..... 474
Pursell v. Mayor, etc.....	85 N. Y. 330..... 27

Q.

Quin v. Brittain	Hoff. Ch. 353..... 528
------------------------	------------------------

R.

Railway Pass. A. Co. v. Warner	62 N. Y. 651..... 619
Rawson v. P. R. R. Co.....	48 N. Y. 216..... 549
Reed v. McCourt	41 N. Y. 485..... 314
Reining v. City of Buffalo.....	102 N. Y. 309..... 158
Renard v. Sampson.....	12 N. Y. 561..... 42
Rex v. Medley.....	6 C. & P. 292..... 255
Rex v. Woodfall	5 Burr. 2661..... 174
Richards v. Vil. of Union.....	48 Hun, 263 60

TABLE OF CASES CITED.

		PAGE.
Richmond v. Irons.....	121 U. S. 27	404
Ricks v. Hilliard.....	45 Miss. 359	72
Robb v. Hackley.....	23 Wend. 50.....	618
Roberts v. Ely.....	118 N. Y. 128.....	220
Rockwell v. Nearing.....	35 N. Y. 308.....	236
Roe v. Strong	107 N. Y. 350, 358.....	320, 322
Ross v. Terry.....	63 N. Y. 613.....	14
Rothschild v. Mack	115 N. Y. 1.....	58
Russell Mfg. Co. v. N. H. St. Bt. Co.	50 N. Y. 121.....	267

S.

St. Vincent O. Asylum v. City of Troy,	76 N. Y. 108.....	647
Sands v. Hughes	53 N. Y. 287	647, 649
Sanders v. Yonkers	63 N. Y. 489.....	357
Schnaider B. Co. v. Niederweiser ...	28 Mo. App. 233, 236.....	310
Seaman v. Duryea	10 Barb. 523.....	32
Seymour v. Cagger	13 Hun, 29	114
Seymour v. Dunham.....	24 Hun, 93	61
Seymour v. McKinstry	106 N. Y. 240.....	364
Seymour v. Minturn	17 J. R. 170	89
Shaw v. McCullough.....	3 West Va. 260	310
Shawneetown v. Mason	82 Ill. 337	255
Shepard v. B. N. Y. & E. R. R. Co.	35 N. Y. 641.....	474
Shepard v. Shepard.....	7 Johns. Ch. 57.....	547
Sheridan v. Andrews.....	80 N. Y. 648.....	417
Sherman v. H. R. R. R. Co.....	64 N. Y. 254.....	433
Silsbury v. McCoon	3 N. Y. 379.....	426
Simar v. Canaday.....	53 N. Y. 298.....	380
Simson v. Brown	68 N. Y. 355.....	89
Sipple v. State.....	99 N. Y. 287.....	550
Slack v. Brown.....	13 Wend. 390.....	564
Smith v. Brady.....	17 N. Y. 176.....	90
Smith v. Braine	3 Eng. L. & Eq. 379	365
Smith v. Felton	43 N. Y. 419.....	58
Smith v. Johnson.....	15 East. 215	481
Smith v. Levinus	8 N. Y. 472.....	234
Smith v. Livingston.....	111 Mass. 342	365, 366
Smith v. Maryland.....	18 How. (U. S.) 71	234
Smith v. Sac County.....	11 Wall. 139.....	366
Southwell v. Bowditch.....	L. R. (1 C. P. Div.) 374.....	398
Spaulding v. Rosa	71 N. Y. 40.....	114
Spence v. Healey	8 Exch. 668.....	8, 9
Staats v. H. R. R. R. Co.	3 Keyes, 196.....	474
Stackus v. N. Y. C. & H. R. R. R. Co.	79 N. Y. 464.....	153
Starin v. Town of Genoa	23 N. Y. 439.....	294
State ex rel. v. Williams.....	77 Mo. 463	311
Stetson v. Kempton.....	13 Mass. 271.....	290

TABLE OF CASES CITED.

xxi

		PAGE.
Stewart v. Chambers.....	2 Sandf. Ch. 882.....	84, 85
Stewart v. Lansing.....	104 U. S. 505.....	365
Stewart v. Robinson.....	115 N. Y. 328.....	411
Stilwell v. Carpenter.....	59 N. Y. 414.....	36
Stilwell v. Priest.....	85 N. Y. 649.....	408
Stockwell v. Bk. of Malone.....	36 Hun, 583.....	556
Stoddard v. Denison.....	38 How. Pr. 296.....	526
Stokes v. Stickney.....	96 N. Y. 323.....	124
Strang v. Ferguson.....	14 J. R. 161.....	482
Stringham v. Hilton.....	111 N. Y. 188.....	125
Sullivan v. Langley.....	120 Mass. 437.....	165

T.

Tallinger v. Mandeville.....	118 N. Y. 432.....	547
Talmage v. Pell.....	7 N. Y. 328.....	52
Taylor v. City of Cohoes.....	105 N. Y. 54.....	158
Thomson v. Thomson.....	1 Bradf. 24.....	84
Thorne v. Turck.....	94 N. Y. 90.....	389
Tillotson v. Wolcott.....	48 N. Y. 188.....	554
Tompkins v. Fonda.....	4 Paige, 448.....	330, 331
Town of Guilford v. Suprs. Che- nango Co.....	13 N. Y. 143.....	211
Town of Hackettstown v. Swack- hamer.....	37 N. J. L. 191.....	292
Trustees Union College v. Wheeler..	61 N. Y. 88, 98.....	592
Tuttle v. Jackson.....	6 Wend. 213.....	592
Tyler v. Ætna F. Ins. Co.....	2 Wend. 280.....	485

U.

Uline v. N. Y. C. & H. R. R. Co.	101 N. Y. 98.....	604
----------------------------------	-------------------	-----

V.

Valett v. Parker.....	6 Wend. 615.....	365
Van Alstyne v. Cook.....	25 N. Y. 489.....	106, 156
Van Brunt v. Day.....	81 N. Y. 251.....	597
Van Wormer v. Mayor, etc.....	15 Wend. 263.....	236, 238
Vickers v. Hertz.....	L. R. (2 S. & D. App.) 113.....	395
Viets v. Union Nat. Bk.....	101 N. Y. 563.....	202
Vosper v. Mayor, etc.....	17 J. & S. 296.....	255

W.

Walling v. Miller.....	108 N. Y. 173.....	108
Walworth v. Abel.....	52 Penn St. 370.....	72
Weaver v. Roth.....	105 Penn. St. 408.....	72
Webb v. Odell.....	49 N. Y. 583.....	14
Weber v. Manne.....	42 Hun, 557; 105 N. Y. 627.....	309
Weller v. Snover.....	42 N. J. L. 341.....	240

TABLE OF CASES CITED.

		PAGE.
Wheeler v. Van Houten	12 J. R. 313	481
White v. Wager.....	25 N. Y. 328.....	546, 547
Whiteside v. Predegast.....	2 Barb. Ch. 471.....	412
Whiton v. Snyder.....	88 N. Y. 299.....	549
Wiberly v. Matthews.....	91 N. Y. 648.....	479
Wiles v. Suydam.....	64 N. Y. 173.....	403
Williams v. Blackwall.....	2 Hurlst. & Colt. 83....	240
Wilson v. Doran.....	110 N. Y. 101.....	564
Wilson v. Doran.....	39 Hun, 90	565
Wilson v. Robertson	21 N. Y. 587.....	465
Wilson v. Rocke.....	58 N. Y. 642.....	364
Winans v. Peebles.....	32 N. Y. 423	546, 547
Winter v. Eckert.....	93 N. Y. 867.....	24
Winton v. Winton	31 Hun, 290	521
Wisner v. Ocumpaugh.....	71 N. Y. 113.....	545
Wohlfahrt v. Beckert.....	92 N. Y. 490.....	550
Wolfe v. Howes	20 N. Y. 197.....	114
Wood v. Chapin.....	18 N. Y. 509.....	535
Wood v. Phillips.....	11 Abb. (N. S.) 1.....	124
Wray v. Fedderke	11 J. & S. 335....	619
Wygant v. Smith.....	2 Lans. 185.....	556
Wynehamer v. People.....	13 N. Y. 378.....	234

Z.

Zabriskie v. Smith.....	13 N. Y. 322.....	857
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CASES DECIDED

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

COMMENCING JANUARY 14, 1890.

WILLIAM MCCREERY et al., Appellants, v. MELVILLE C. DAY
et al., Respondents.

Where a contract is rescinded while in course of performance, no claim in respect of performance, or of what has been paid or received thereon may thereafter be made, unless expressly or impliedly reserved upon the rescission.

Whatever, under the former system of procedure, would have constituted a good ground in equity for restraining the enforcement of a covenant or decreeing its discharge, will now constitute a good equitable defense to an action on the covenant itself.

A substituted parol agreement followed by actual performance, whether made and executed before or after breach of a covenant in the original contract, is a good accord and satisfaction of the covenant. So, also, a new agreement, although without performance, if based on a good consideration, will be a satisfaction if accepted as such.

A contract under seal may be annulled by a substituted parol agreement followed by actual performance.

(Argued November 26, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 24, 1889, which affirmed a judgment in favor of defendants, entered upon an order of Special Term granting a motion for judgment on the pleadings.

This action was brought to recover certain sums alleged

119	1
128	91

119	1
146	214

119	1
147	410

119	1
156	372

119	1
157	295

Statement of case.

to be due plaintiffs under a contract dated March 2, 1882, between the plaintiffs, as parties of the first part, and C. H. Andrews, as party of the second part, and C. K. Garrison, defendant's testator, as party of the third part.

By the terms of the contract, plaintiffs sold to Garrison a one-fourth interest in a contract for the construction of the railroad of the Pittsburgh, Youngstown and Chicago Railroad Company, running from Pittsburgh to Akron, and agreed to turn over to Garrison a one-fourth part of all cash, bonds and stock which should be received from that railroad company in payment for the work done under the construction contract. Garrison agreed to pay the plaintiffs, for work already done and materials furnished and rights acquired up to the date of the contract, the sum of \$150,000, and pay them, from time to time thereafter, one-fourth of the amounts expended by them in the further construction of the road under the contract.

Plaintiffs sought to recover the one-fourth part of moneys expended by them after March 2, 1882, in carrying out their contract with the Pittsburgh, Youngstown and Chicago Railroad Company, and also to recover interest during the time Garrison delayed payment of the sum of \$150,000.

The answer set up, among other things, the following facts: On the 13th day of April, 1882, the plaintiffs and said C. H. Andrews executed an agreement with the Pittsburgh and Western Railroad Company, by which the plaintiffs and C. H. Andrews agreed to sell to the Pittsburgh and Western Railroad Company a one-fourth interest in the Pittsburgh, Youngstown and Chicago railroad, as described, between Newcastle Junction and Akron, for \$150,000, those persons agreeing to pay for all expenditures for work done or materials furnished up to that date. The Pittsburgh, Youngstown and Chicago Railroad Company was to abandon the further construction of the projected railroad between the towns of Newcastle Junction and Akron, for the building of which railroad between those points the Pittsburgh, Cleveland and Toledo Railroad Company

Statement of case.

was created. On the 6th day of November, 1882, Garrison, the defendants' testator wrote to the plaintiffs and to C. H. Andrews a letter acknowledging the receipt of the papers designed for the completion of the road from Akron to Newcastle Junction by the Pittsburgh and Western railroad, consenting to sign them, but only on the understanding and condition "that I am not to pay any more money than Mr. Humphrey's company" (the Pittsburgh and Western) "pays, as provided in the agreement you made with him April thirteenth — that is, \$150,000 and one-fourth of the cost of the road to Newcastle Junction after that date." Garrison in the same letter asserted that he had given up the agreement of the second of March above mentioned, and declared that he no longer desired any interest in the railroad from Newcastle Junction to Pittsburgh. Afterwards, and in compliance with the terms of that letter, the plaintiffs, with the said C. H. Andrews and the defendants' testator, caused an agreement to be indorsed on the contract of March 2, 1882, as follows: "It is agreed by the parties hereto that the within contract is annulled and of no further effect, the same having been superseded by the agreement and arrangement made in lieu thereof, as embodied in the letter of C. K. Garrison * * * * dated November 6, 1882, and by a certain agreement made between C. H. Andrews, W. C. Andrews, W. McCreery, James Gallerey, Solomon Humphreys and C. K. Garrison, all bearing date October 25, 1882." This writing was signed by all the parties.

The agreement last referred to was fully carried out by all the parties. An order was made requiring plaintiffs to reply, which they did, substantially admitting the foregoing averments of the answer.

J. W. Hawes for appellants. In no event can the alleged annulment wipe out the rights already accrued to the plaintiffs. (*Roe v. Conway*, 74 N. Y. 201; *Tice v. Zinsser*, 76 id. 549; *Howard v. W. & S. R. R. Co.*, 1 Gill, 311; *Killip v. Metzen*, 50 N. Y. 658; *Allaire v. Whitney*, 1 Hill, 484; *Bowman v. Teall*, 23 Wend. 306; *Hill v. Blake*, 16 J. & S.

Statement of case.

253; *McKnight v. Dunlop*, 5 N. Y. 537; *Hinsdale v. White*, 6 Hill, 507; *McKeon v. Whitney*, 3 Denio, 452; *Johnson v. Oppenheim*, 55 N. Y. 280; *Barber v. Rose*, 5 Hill 76; *Shute v. Hamilton*, 3 Daly, 462, 470; *Harrison v. M. P. R. Co.*, 74 Mo. 364, 373; *C. & T. R. R. Co. v. Perkins*, 17 Mich. 296; *Mallory v. Lord*, 29 Barb. 454; *Coon v. Reed*, 1 Hilt. 511; *Towers v. Barrett*, 1 Term R. 133; *Davis v. Street*, 1 Car. & Payne, 18; *Barber v. Lyon*, 8 Blackf. 215; *Kelsey v. U. S.*, 1 Ct. of Claims, 374; *Watkins v. Hodges*, 6 H. & J. 38; *Gillet v. Maynard*, 5 John. 85; *Thompson v. Lyons*, 21 J. & S. 101; *McMaster v. State*, 108 N. Y. 542; *Sperry v. Miller*, 16 id. 407; *Endriss v. B. I. I. Co.*, 49 Mich. 279; *Grannewiann v. Kloepper*, 24 Ill. App. 277; *Russell v. Allerton*, 108 N. Y. 288; *Porteons v. Williams*, 21 J. & S. 242.) If the alleged annulment is effective for any purpose, it does not affect the section of the road E. of Newcastle Junction which was continued under the old company. A new agreement to supersede a former one must cover the same ground and be inconsistent with it. Otherwise the old will stand, except as modified. (*Witbeck v. Waine*, 16 N. Y. 532; *Martin v. Colby*, 42 Hun, 1; *Holdsworth v. Tucker*, 3 N. E. Rep. 499; *Norton v. Yerdon*, 19 N. Y. Wkly. Dig. 296; *Utley v. Donaldson*, 94 U. S. 29; *Murray v. Harway*, 56 N. Y. 337; *Coe v. Hobby*, 72 id. 141.) The alleged annulment is void for want of consideration. There was no adjustment and settlement of a disputed claim here. (*Vanderbilt v. Schreyer*, 91 N. Y. 392; *Smith v. Kerr*, 108 id. 31; *Little v. Rees*, 34 Minn. 277; *Siguer v. Newcomb*, 6 N. Y. S. Rep. 315; *Wharton v. M. C. F. Co.*, 1 Mo. App. 577.) A subsequent executory contract to be operative as a defeasance or modification of a previous contract by specialty must be under seal, whether it have a consideration or not, and whether it be made before or after a breach of the previous contract. (*Delacroix v. Bulkley*, 13 Wend. 71; *Hume v. Taylor*, 63 Ill. 43; *Eddy v. Graves*, 23 Wend. 82; *Roe v. Conway*, 74 N. Y. 201.)

Opinion of the Court, per ANDREWS, J.

William Bronk and Melville C. Day for respondents. The motion for judgment on the pleadings was made at the proper time and place and in the proper manner. (*People v. N. R. R. Co.*, 42 N. Y. 217.) Where a contract is rescinded or annulled by the mutual agreement of parties without any reservation as to the time the act of annulment is to take effect, or other restriction, the contract is absolutely at an end and is no longer available to either party for any purpose. (*Beach v. Endress*, 51 Barb. 570; *Fullager v. Reville*, 3 Hun, 600; *Roe v. Conway*, 74 N. Y. 206; *Larkin v. Hardenbrook*, 90 id. 333; *McKnight v. Dunlap*, 5 id. 546.) The plaintiffs, in their reply, deny that the indorsement on the original contract was made in compliance with Garrison's letter, but they admit the execution of the indorsement, and that specifically refers to the letter. The facts thus specifically admitted must override any general and inconsistent averment of conclusions, such as are set up in the reply. (2 Wait's Pr. 332; *Conaughty v. Nichols*, 42 N. Y. 82; *Read v. Lambert*, 10 Abb. [N. S.] 428; *Herman v. Bencke*, 8 N. Y. S. R. 345.)

ANDREWS, J. The parties by their agreement indorsed on the contract of March 2, 1882, in terms annuled that contract and declared that it should be of no further effect. The claim that the annulment of the contract did not discharge Garrison's obligation under the original contract to pay his proportion of expenditures made by the plaintiffs for the constuction of the Pittsburgh, Youngstown and Chicago railroad, between the date of the contract and its annulment, depends on the intention to be deduced from the agreement of annulment, construed in light of the attending circumstances. Where a contract is rescinded while in the course of performance, any claim in respect of performance, or of what has been paid or received thereon, will ordinarily "be referred to the agreement of rescission and in general no such claim can be made unless expressly or impliedly reserved upon the rescission." (Leake on Contracts, 788, and cases cited.)

The agreement annulling the original contract recites that, the

Opinion of the Court, per ANDREWS, J.

contract had been "superseded by agreements and arrangements made in lieu thereof," embodied in Garrison's letter of November 6, 1882, and the several contracts executed by the parties to that contract, and others, bearing date October 25, 1882. In ascertaining the scope of the agreement annulling the original contract, the letter and the contracts of October 25, 1882, are to be deemed incorporated into the agreement. Construing these several writings together, they plainly show that the parties intended that Garrison should be discharged from all liability under his contract of March 2, 1882, for any expenditures theretofore made, or thereafter to be made in constructing the line between Pittsburgh and Newcastle Junction. The letter was written after Garrison had received the contracts dated October 25, 1882, for execution, and declares that he will sign them on the condition, and understanding that he is not to pay anything more than Mr. Humphrey's company pays, under the plaintiff's agreement with him of April 13, 1882, "that is \$150,000, and one-fourth of the cost of the road to Newcastle Junction, after that date." The agreement with Mr. Humphrey, of April 13, 1882, provided for the construction of the part of the line of the Pittsburgh, Youngstown and Chicago Railroad between Newcastle Junction and Akron, by a new corporation to be formed, and that Humphrey should pay the plaintiffs \$150,000 for expenditures incurred and rights acquired on that branch of the road, prior to the making of the contract, and also one-fourth of all expenditures thereafter made in its completion. The letter goes on to state that the agreement with Mr. Humphrey was made "after consulting with me, and, as it insured my road (Wheeling and Lake Erie railroad) a line to Pittsburgh, I was ready to assent to it in place of the agreement of the second of March, and you know I have so considered it since, and that I was owner of one-fourth of the new company, all previous agreements between us being superseded. I do not want any interest in the road from Newcastle Junction to Pittsburgh. I will pay whatever Mr. Humphrey's company has paid on the agreement of the 13th April."

The clear import of the proposition of Mr. Garrison in his letter is, that he would sign the contracts of October 25, 1882, provided he should be placed in the same position in respect to the enterprise, as that occupied by the company represented by Mr. Humphrey, and be relieved from all interest in, or obligation to contribute to the construction of the part of the Pittsburgh, Youngstown and Chicago railroad between Pittsburgh and Newcastle Junction. Garrison, thereafter, executed the contracts of October 25, 1882, relating to the construction of the road between Newcastle Junction and Akron, whereby he assumed other and different obligations from those he had assumed by his contract with the plaintiffs of March 2, 1882.

The main claim in the action is to recover from Garrison's estate, under the contract of March 2, 1882, for a share of expenditures made by the plaintiffs in the construction of the part of the Pittsburgh, Youngstown and Chicago railroad between Pittsburgh and Newcastle Junction, after the date of that contract, and before the execution of the annulment agreement. The agreement annulling the prior contract is supported by an adequate consideration. The new obligation which Garrison assumed under the contracts of October 25, 1882, was alone a sufficient consideration. (*City of Memphis v. Brown*, 20 Wall. 289.) There was a consideration also in the mutual agreement of the parties to the prior contract (which was still executory, although in the course of performance) to discharge each other from reciprocal obligations thereunder and to substitute a new and different agreement in place thereof.

The contract of March 2, 1882, is sealed, while the agreement annulling it is unsealed. Upon this fact the plaintiffs make a point, founded on the doctrine of the common law, that a contract under seal cannot be dissolved by a new parol executory agreement, although supported by a good and valuable consideration, "for, every contract or agreement ought to be dissolved by matter of as high a nature as the first deed." (*Countess of Rutland's Case*, Coke, Pt. V, 25b.) The application of this rule often produced great

Opinion of the Court, per ANDREWS, J.

inconvenience and injustice, and the rule itself has been overlaid with distinctions invented by the judges of the common law courts to escape or mitigate its rigor in particular cases. But in equity the form of the new agreement is not regarded, and under the recent blending of the jurisdiction of law and equity, and the right given by the modern rules of procedure in this country and in England to interpose equitable defenses in legal actions, the common law rule has lost much of its former importance. A recent English writer, referring to the effect of the common law Procedure Acts in England, says, "The ancient technical rule of the common law, that a contract under seal cannot be varied or discharged by a parol agreement, is thus practically superseded." (Leake on Contracts, 802.) Courts of equity often interfered by injunction to restrain proceedings at law to enforce judgments, covenants, or obligations equitably discharged by transactions of which courts of law had no cognizance. (2 Sto. Eq., § 1573.) It is a necessary consequence of our changed system of procedure, that whatever formerly would have constituted a good ground in equity for restraining the enforcement of a covenant, or decreeing its discharge, will now constitute a good equitable defense to an action on the covenant itself. It was one of the subtle distinctions of the common law as to the discharge of covenants by matter *in pais*, that although a specialty before breach could not be discharged by a parol agreement, although founded on a good consideration, nor even by an accord and satisfaction, yet after breach the damages, if unliquidated, could be discharged by an executed parol agreement, because, as was said, in the latter case the cause of action is founded "not merely on the deed, but on the deed and the subsequent wrong." (Broom's Legal Maxims, 848, and cases cited.) The absurd results to which the common law doctrine sometimes led is illustrated by the case of *Spence v. Healey* (8 Exch. 668), in which it was held that a plea to an action on covenant for the payment of a sum certain, that before breach defendant satisfied the covenant by the delivery to, and acceptance by the plaintiff, of goods, machinery, etc., in satisfaction, was

Opinion of the Court, per ANDREWS, J.

bad, Martin, B., saying, "I am sorry I am compelled to agree in holding that the plea is bad. It is difficult to see the correctness of the reason upon which the rule is founded." I suppose there can be no doubt that the facts presented by the plea in the case of *Spence v. Healey* would have constituted a good ground for relief in equity. The technical distinction between a satisfaction before or after breach, seems to have been disregarded in this state, and a new agreement by parol, followed by actual performance of the substituted agreement, whether made and executed before or after breach, is treated as a good accord and satisfaction of the covenant. (*Fleming v. Gilbert*, 3 John. 530; *Lattimore v. Harsen*, 14 id. 330; *Dearborn v. Cross*, 7 Cow. 48; *Allen v. Jaquish*, Cowen, J., 21 Wend. 633.) So also, a new agreement, although without performance, if based on a good consideration, will be a satisfaction, if accepted as such. (*Kromer v. Heim*, 75 N. Y. 574, and cases cited.)

In the present case it may be justly said, that when the agreement annulling the contract of March 2, 1882, was executed, there had been no breach by Garrison of his covenant therein, as he had not been called upon by the plaintiffs to pay his share of the construction account. But it was the plain intention of the parties that the new arrangement, then entered into, should be a substitute for the liability of Garrison, present and prospective, under the contract of March 2, 1882. The transaction constituted a new agreement in satisfaction of the prior covenant, and was accepted as such. Moreover, it admitted by the reply that the contracts of October 25, 1882, were carried out. It is a case, therefore, of an executory parol contract, made in substitution of the prior sealed contract, afterwards fully executed, which clearly, under the authorities in this state, discharged the prior contract.

In respect to the claim to recover interest during the time the payment of the \$150,000 was delayed, it is a sufficient answer that the complaint admits that the principal sum was fully paid prior to September 13, 1882. The claim for interest did not survive, there being no special circumstances

Statement of case.

to take the case out of the general rule. (*Cutter v. Mayor, etc.*, 92 N. Y. 166, and cases cited.)

We are of opinion that the facts admitted in the pleadings disclose that there was no right of action and that the complaint, for this reason, was properly dismissed.

The judgment should therefore be affirmed.

All concur.

Judgment affirmed. _____

119	10
e165	124

WILLIAM D. MANDEVILLE, Appellant, v. DARIUS A. NEWTON,
as Executor, etc., Respondent.

Where upon trial before a referee, evidence is received and a question of fact is litigated, without any objection that the fact is admitted and the evidence is inadmissible under the pleadings, the referee is justified in refusing to find in accordance with the alleged admissions, and in determining the question upon the evidence.

It seems that on a purchase of promissory notes, appearing on their face to be valid and uncanceled obligations, but which in fact have been paid, or the indorsers upon which have been discharged to the knowledge of the vendor, the vendee, in case he purchased without notice, has a cause of action against the vendor, based upon an implied warranty that the notes were what they appeared to be.

Where, however, a party holding certain notes, with other indebtedness against the maker, and holding certain claims as collateral security therefor, and who had made various collections on the collaterals, sufficient to pay the notes, but which had not been applied in payment of any specific items of indebtedness, at the instance of the debtor, and on payment of the balance due him, assigned his claims and transferred the notes with the collaterals to another creditor, without any express warranty that the notes were valid outstanding obligations, *held*, that no warranty could be implied.

(Argued December 4, 1889 ; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday in June 1888, which affirmed a judgment in favor of defendant, entered upon the report of a referee.

The complaint alleged, in substance, that Marvin, defendant's testator, was the owner and holder of four promissory notes,

Statement of case.

one made by Francis N. Whitcomb, the others made by D. Rawson & Co., all of which were indorsed by the payees, and the payment of one of them was guaranteed; that plaintiff, induced by the representations of said Marvin, that the said notes were unpaid and that nothing had occurred to discharge the indorsers or the guarantor and that they had no defense thereto, purchased said notes, paying said Marvin in full for the same, whereas, in truth, the notes had been paid in full and indorsers and guarantor fully discharged.

The answer admitted that at the time stated in the complaint Marvin owned the notes specified; that Whitcomb was the surviving partner of D. Rawson & Co.; that at a time prior to the alleged transfer to plaintiff, said Whitcomb individually and as surviving partner, being indebted to Marvin upon said notes and various other claims, assigned and transferred to him certain personal property, claims and demands, under the agreement that the proceeds of collection should be applied upon such indebtedness, and if a sufficient amount was collected to pay the same, Whitcomb should be discharged and released; that at the time stated in the complaint Marvin had made various collections on the collaterals, and upon representations made by plaintiff that Whitcomb was indebted to him, and on payment of the balance due Marvin, the latter delivered to plaintiff the said notes and assigned to him the uncollected accounts, etc., so held as collaterals, a portion of which were good and collectable; that Marvin notified plaintiff, at the time, of the arrangement under which he held the collaterals. Defendant denied the making of any representations or warranty, "or that he made any other or different transfer of said notes than as herein stated."

Evidence was received on the trial, without objection, as to the arrangement under which the notes were transferred, showing it to be substantially as set forth in the answer; that the plaintiff, who was a creditor of Rawson & Co., applied to said Whitcomb for payment of his debt, and was informed by him that Marvin had property in his hands to secure a debt due him; that by paying the balance due Marvin, and taking the collaterals he held, he could have the benefit of

Statement of case.

them, and so save his own debt; that thereupon plaintiff called upon Marvin and ascertained the balance due, and upon being paid that amount Marvin transferred his claims with the collaterals to plaintiff. Prior to said transfer no application of the sums collected by Marvin on the collaterals in extinguishment of any specific items of the indebtedness owing to him by Rawson & Co. had been made; sufficient had been collected to pay the notes. Plaintiff, after the assignment to him of the claims of Marvin, with the collaterals, treated the notes as paid. There was no express warranty by Marvin that the notes were valid outstanding obligations either against the maker or indorser.

J. H. Waring for appellant. Facts admitted by the pleadings were not only disregarded by the referee, but they were flatly contradicted by the findings which he made. (Code Civ. Pro., § 522; *Tell v. Beyer*, 38 N. Y. 161; *Townshend v. Townshend*, 1 Abb. [N. C.] 81; *Roberts v. Good*, 2 Trans. App. 103; *Marston v. Swett*, 66 N. Y. 206; *West v. A., etc., Bk.*, 44 Barb. 175; *Beals v. H. Ins. Co.*, 36 N. Y. 522, 527; *Maurice v. H. R. R. Co.*, 3 Duer, 426, 441; *Tolman v. Manufacturers, etc.*, 55 Mass. 73; *Bell v. Dugg*, 60 N. Y. 528, 532; *Delaware Bk. v. Jarvis*, 20 id. 226; *Fake v. Smith*, 2 Abb. Ct. App. Dec. 76; Code, § 1023; *Ballou v. Parsons*, 11 Hun, 602; *Cleveland v. Hatch*, 25 id. 308; *Paige v. Willetts*, 38 id. 28; *Thomas v. Austin*, 4 Barb. 265; *Crosbie v. Leary*, 6 Bosw. 312; *Bridge v. Payson*, 5 Sandf. 210.) The plaintiff was entitled to recover on the facts alleged in his complaint and not denied by the answer. (*Littauer v. Goldman*, 72 N. Y. 206, 209-210; *D. Bk. v. Jarvis*, 20 id. 226, 229; *Ross v. Terry*, 63 id. 613; *Webb v. Odell*, 49 id. 553.) On the sale of a note, where nothing is said on the subject, a warranty is implied that it is unpaid. (*Sherman v. Johnson*, 56 Barb. 59; *Furness v. Ferguson*, 15 N. Y. 437; 34 id. 485, 490.)

William Spargur for respondent. To make out a case of implied warranty, there must not only be a withholding of

Opinion of the Court, per ANDREWS, J.

known facts, but fraud must be practiced. (72 N. Y. 506; 81 id. 101; 60 id. 528.) A man holding collaterals by simply receiving his pay and transferring them at the request of the owner of them, incurs no liability. (19 N. Y. 499.) There is no view of this case that entitles the plaintiff to a judgment. (10 N. Y. 198.)

ANDREWS, J. It is plain, from the circumstances developed upon the trial, that the real intention of the transaction between the plaintiff and Marvin, the defendant's testator, was to substitute the former to the position of the latter in respect of the debt owing by Rawson & Co. to Marvin, and the collaterals held by him as security therefor. It was not in any proper sense a purchase by the plaintiff of the notes held by Marvin, except in so far as they, with the other claims transferred to the plaintiff at the same time, represented the balance which, after the application of what had been collected by Marvin, would remain due to him on the claims transferred. Prior to the transfer by Marvin to the plaintiff, no application of the sums collected by Marvin on the collaterals in extinguishment of any specific items of the indebtedness owing by Rawson & Co. had been made. Sufficient had been collected to pay the notes, but in the absence of any specific application of the collections thereon, they were not technically paid. The plaintiff, after the assignment to him of the claims of Marvin, with the collaterals, treated the notes as paid. Prior to the assignment the plaintiff had arranged with Rawson & Co., or the survivor of that firm, that he should have the benefit of the collaterals held by Marvin, over and beyond the interest therein which Marvin held, to apply upon the plaintiff's own debt against the firm. It was to obtain this advantage that the plaintiff paid Marvin the balance of his claim and took the assignment.

There was no express warranty by Marvin that the notes were valid obligations, either against the makers or indorser, and none can be implied under the circumstances. It is conceded that the sum paid by the plaintiff to Marvin, was the

Opinion of the Court, per ANDREWS, J.

exact sum due the latter from Rawson & Co. It may be true, as claimed by the counsel for the plaintiff, that on a purchase of notes, appearing on their face to be valid and uncanceled obligations, but which in fact have been paid, or the indorsers discharged to the knowledge of the vendor, a cause of action would arise in favor of a vendee who purchased without notice, against the vendor, based upon an implied warranty that the notes were valid obligations. (*Delaware Bank v. Jarvis*, 20 N. Y. 226; *Webb v. Odell*, 49 id. 583; *Ross v. Terry*, 63 id. 613; *Littauer v. Goldman*, 72 id. 506.

The plaintiff insists that the complaint contains allegations, not denied by the answer, showing that the transaction between the plaintiff and Marvin was a purchase of the notes by the plaintiff in the ordinary sense, in good faith, for a full consideration, when in fact they had been paid and the indorsers discharged to the knowledge of Marvin. These averments it is contended are to be regarded as conclusively established, and precluded the defendant from showing that the transaction was other or different from that alleged in the complaint. There is no direct denial in the answer of the allegations upon which the plaintiff relies. But it sets forth with some detail the nature of the transaction between Marvin and the plaintiff, and concludes by denying that Marvin "made any other or different transfer of said notes than as herein stated." The real transaction was the subject of investigation on the trial, and was litigated without any objection being raised that the evidence was inadmissible under the pleadings. The first time that the question was raised was when findings based on the pleadings were proposed by the plaintiff. The referee was, we think, justified under the circumstances in refusing to find in accordance with the alleged admissions. This disposes of the main question in the case. The merits of the controversy were properly adjudged in the courts below, and the exceptions to evidence point out no reason for a reversal of the judgment.

The judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

Statement of case.

119	15
156	513

FARMERS' LOAN AND TRUST COMPANY, Respondent, v. BANKERS AND MERCHANTS' TELEGRAPH COMPANY et al., JOHN A. ROEBLINGS' SONS COMPANY, Appellant.

The judgment in an action to foreclose a mortgage executed by a telegraph company to secure its bonds, recited the amount due upon the bonds as it appeared by affidavit, ordered the referee appointed to sell to ascertain and report the amount due "on such bonds as may be ascertained and reported by such referee to be secured by said mortgage," with the names of the persons holding them and by what title, and to sell, unless previous to the sale "the amount herein found as actually due and payable" shall be paid. The referee did not, prior to the sale, report the amount due; his report of sale was confirmed. On motion by a bondholder to set aside the sale, upon the ground that the failure to make such report rendered the sale illegal, *held*, that the court below was competent to interpret its own judgment, and its confirmation of the sale showed its understanding to be that the reference as to amount of bonds was to be executed after sale. Also, *held*, that, inasmuch as it appeared that the entire proceeds of the foreclosure would be exhausted in paying claims paramount to the bonds, the omission to execute the reference before sale, conceding it was required by the judgment, was at most a harmless irregularity; and that the court below had power, in its discretion, to refuse to set aside the sale on that account. The judgment did not expressly authorize the referee to execute a deed to the purchaser; it provided that the purchaser should be entitled to possession on production of his deed, and that the mortgagor and its receiver should join in the deed. It was claimed that the referee had no authority, under the judgment, to execute a deed. *Held*, untenable; that such authority was to be understood from the language of the judgment; also, that as the court below had sanctioned the giving of the deed and thus construed its judgment, no ground of complaint on that account remained.

The judgment provided that the purchaser should pay a certain amount of the purchase-price in cash, and that the balance might be paid in receiver's certificates or in bonds, to be received at a *pro rata* rate, as provided. Upon the sale the purchaser paid the cash required and delivered to the referee what was supposed, at the time, to be a sufficient amount of certificates, but which afterwards proved to be insufficient to pay the balance of the purchase-money; he also gave ample security to pay any balance that might be found due. In confirming the referee's report, the court ordered that the referee should inquire and report to the court what receiver's certificates should have been or should be accepted by him in payment of the purchase-price, and how much, if

Statement of case.

anything, was due upon the purchase-price. It was claimed the full purchase-price should have been paid before the deed was delivered *Held*, untenable.

Prior to the sale a reorganization agreement had been entered into, to which the petitioner was a party. *Held*, that the court was not obliged to set aside the sale because such agreement had been violated; that the court, in its discretion, could leave the petitioner to pursue its remedy by action. The petitioner did not offer to bid for the property upon a resale any more than the price for which it was sold, and did not show that anyone would bid any more; also, with knowledge of all the essential facts, it delayed for nearly two years before making the application. In the meantime the property had gone into the hands of a new corporation, which had expended large sums of money thereon, had mortgaged the same to secure bonds, and had issued stock to a large amount; so that if a resale were ordered it would be impossible to restore the parties to be affected thereby to their former position, and irreparable mischief might be done. *Held*, that the petitioner had no absolute legal right to have the sale set aside; that the court below had discretion to deny the application; that it did not appear it had abused its discretion, and, therefore, this court had no jurisdiction to review the order appealed from.

(Argued December 9, 1889 ; decided January 14, 1890.)

APPEAL by John A. Roeblings' Sons Company from order of the General Term of the Supreme Court in the first judicial department, made June 9, 1889, which affirmed an order of Special Term, denying a petition to set aside a sale under the judgment herein.

This action was brought to foreclose a mortgage executed by defendant, The Bankers and Merchants' Telegraph Company, upon its property to plaintiff as trustee. The mortgagor became insolvent, receivers of its property were appointed with power to operate and manage its lines of telegraph, until the further order of the court, with authority to issue receivers' certificates, which was done. Under judgment of foreclosure and sale the property was sold by a referee appointed for that purpose. The purchaser assigned his bid to defendant, The United Lines Telegraph Company, to which company the property was conveyed by the referee. On the coming in of the report of sale, the appellant, as the holder of mortgage bonds and

Statement of case.

receivers' certificates, excepted thereto and petitioned to set aside the sale.

The further material facts appear in the opinion.

Wheeler H. Peckham for appellant. The court erred in overruling the exception of the Roebling company. (*C., etc., R. R. Co. v. Fosdick*, 106 U. S. 47-71.)

Robert G. Ingersoll for the United States Telegraph Company and Edward S. Stokes respondents. The appellant is estopped by laches and positive acquiescence. (*L. C. Co. v. A. C. R. R. Co.*, 15 Fed. Rep. 47; *T. L. O. Co. v. Marbury*, 91 U. S. 587; 2 Hermann on Estoppel, 1195; *Norway v. Rowe*, 19 Ves. 144; *Clegg v. Edmondson*, 8 De G., M. & G. 787; *Burnett v. Brown*, 105 Mass. 551; *McMahon v. N. Y. & L. B. R. R. Co.*, 24 N. J. Eq. 56; *In re Woolsey*, 95 N. Y. 135; *In re Flushing Ave.*, 101 id. 155; *Depew v. Dewey*, 46 How. Pr. 441, 447, 448; *S. H. B. Co. v. E. H. B. Co.*, 56 id. 70; *Lockwood v. McGuire*, 57 id. 266; *Haines v. Taylor*, 3 How. Pr. 205; *Gardner v. Ogden*, 22 N. Y. 327, 340; *E. F. Co. v. Hersee*, 33 Hun, 169, 178, 185; 103 N. Y. 24, 27; *Muller v. Tuska*, 87 id. 166; *Acer v. Hotchkiss*, 97 id. 395; *B. F. Co. v. Cox*, 106 id. 555; *Hayes v. Midas*, 104 id. 602; *Fowler v. B. S. Bk.*, 113 id. 450, 455; *Rodermund v. Clark*, 46 id. 354.) It asks for equitable relief and does not offer to do equity. (*Peck v. N. Y. & N. J. R. Co.*, 85 N. Y. 246; *C. L. Ins. Co. v. Bowman*, 90 id. 654; *Murdock v. Empire*, 9 Abb. Pr. 283; *Lentz v. Craig*, 2 id. 294; *A. Ins. Co. v. Oakley*, 9 Paige, 259, 264; 1 Barb. Ch. 608; *Gould v. Gager*, 18 Abb. Pr. 32; *Lefevre v. Laraway*, 22 Barb. 167; *Dawson v. Drake*, 29 N. J. Eq. 383; *Hazard v. Hodges*, 11 id. 423; *Miller v. Kendrick*, 15 At. 259; *Gilbert v. Haire*, 43 Mich. 283; *Stuts v. Brown*, 14 N. E. Rep. 230.) Neither the reorganization committee, the purchaser, nor the assignee of his bid were guilty of any fraud. (*Matthews v. Murchison*, 15 Fed. Rep. 691, 694; *Peck v. N. Y. & N. J. R. Co.*, 85 N. Y. 246, 252; *In re De Betz*, 9 Abb. Pr.

Statement of case.

246, 252; *N. C. & S. L. R. R. Co. v. U. S.*, 113 U. S. 261; *Vilas v. Page*, 106 N. Y. 439, 452; *C. T. C. Co. v. Seasongood*, 130 U. S. 482; *Fuller v. Van Geesen*, 4 Hill, 171; *Fort v. Burch*, 6 Barb. 75; *McLaren v. H. F. Ins. Co.*, 5 N. Y. 151; *Twitchell v. Bartlett*, 51 id. 447; 52 Barb. 319; *Cheney v. Woodruff*, 45 N. Y. 98; *Whalen v. White*, 25 id. 462; *Stimson v. Arnold*, 5 Abb. [N. C.] 377.) There is no irregularity in the judgment of foreclosure and sale, or in the proceedings had thereunder, and even if held to be irregular, such irregularities have been waived and do not go to the merits. (2 R. S. 327, §§ 60, 61; Code Civ. Pro., §§ 1557, 1577; *Abbott v. Curran*, 98 N. Y. 665; *Blakely v. Calder*, 15 id. 617; *Baldwin v. Doying*, 114 id. 452; *Alvord v. Beach*, 5 Abb. Pr. 451; *H. M. Co. v. Farrington*, 82 N. Y. 121; 22 id. 323; 52 id. 28; 62 id. 86; *Stark v. Dinehart*, 40 id. 342; *Moore v. Shaw*, 77 id. 512; *Birdsall v. Birdsall*, 41 How. Pr. 389; *Keck v. Werder*, 86 N. Y. 264; *Hale v. Clauson*, 60 id. 339; *Marcus v. Leony*, 113 id. 619; *Peck v. N. Y. & N. J. R. Co.*, 85 id. 246.) The confirmation of the sale and the denial of the petition to set it aside were in the discretion of the Special Term, and its action having been approved by the General Term is not subject to review in this court. (*Hale v. Clauson*, 60 N. Y. 339, 341; *Wakeman v. Price*, 3 id. 334; *Dows v. Congdon*, 28 id. 122, 124; *King v. Platt*, 2 Abb. Dec. 527, 531; 3 Abb. [N. S.] 174; 34 How. Pr. 26; *Howell v. Mills*, 53 N. Y. 322, 335; *Goodell v. Harrington*, 76 id. 547; *Fisher v. Hersey*, 78 id. 387; *Wakeman v. Price*, 3 id. 334; *B. S. Bk. v. Newton*, 23 id. 160; *Dows v. Congdon*, 28 id. 122; *Crane v. Stiger*, 58 id. 625; *Hale v. Clauson*, 60 id. 339; *Goodell v. Harrington*, 76 id. 547; *Fisher v. Hersey*, 78 id. 387; *Howell v. Mills*, 53 id. 322, 335; *Peck v. N. Y. & N. J. R. Co.*, 85 id. 246, 252, 253; *Winter v. Eckert*, 93 id. 367, 370; *Dennerlein v. Dennerlein*, 111 id. 518.) The burden is upon the appellant to show that the order of the General Term was made upon grounds which did not authorize the court to exercise any discretion in its decision. (Baylies on

Statement of case.

New Trials and App. 232; *Cushman v. Brundet*, 50 N. Y. 296; *Mills v. Bildreth*, 81 id. 91, 94; *McKenna v. Bolger*, 94 id. 641.) The order appealed from must itself show that it was made upon a ground which did not authorize the court to exercise any discretion in its decision. (Baylies on New Trials and Appeals, 32; *In re K. C. E. R. Co.*, 82 N. Y. 95-98; *Brooks v. M. N. C. Co.*, 93 id. 647; *Bate v. McDowell*, 97 id. 646; *In re N. Y. & H. R. R. Co.*, 98 id. 18; *Thorrington v. Merrick*, 101 id. 5-9; *F. L. & T. Co. v. B. & M. T. Co.*, 15 N. Y. S. R. 516; *In re Board of Street Opening*, 111 N. Y. 581, 583.) So much of this order as orders a reference is not appealable to this court. (*Victory v. Blood*, 93 N. Y. 650; *Jones v. Jones*, 81 id. 35; *Walker v. Spencer*, 86 id. 162; *Hunt v. Chapman*, 62 id. 333; *Thurber v. H. B., etc., R. R. Co.*, 60 id. 326; *Chesterman v. Eyland*, 74 id. 452; *White v. D., L. & W. R. R. Co.*, 41 id. 250; *Potter v. Van Vranken*, 36 id. 619; *Martin v. W. H. Co.*, 70 id. 101; *Harrington v. Bruce*, 84 id. 103.) Respondents are justified in making quotations from order entered in the Supreme Court. (*Dunford v. Weaver*, 84 N. Y. 445; *Bank of Charleston v. Emeric*, 2 Sandf. 718; 2 City Court, 80; *Rockwell v. Furmin*, 8 Abb. [N. S.] 334; *A. Ins. Co. v. Barnard*, 26 Hun, 304; *People v. Snyder*, 41 N. Y. 411; *Howard v. Moot*, 64 id. 271.)

Roger Foster for Wise and Bill, respondents. So much of the petition as seeks to set aside the receiver's certificates issued in the De Haven suit was properly denied. (*Wallace v. Loomis*, 97 U. S. 146, 162, 163; *Vilas v. Page*, 106 N. Y. 439; *Miltenberger v. L. R. Co.*, 106 U. S. 287, 307; *U. T. Co. v. I. M. R. Co.*, 117 id. 434, 461, 462; *S. L. & P. R. Co. v. C. T. Co.*, 22 Fed. Rep. 269, 271; *Gilbert v. W., C. V. M. & G. S. R. Co.*, 33 Grat. 586; *Langdon v. V. & C. R. R. Co.*, 53 Vt. 228; *Humphreys v. Allen*, 101 Ill. 490; *Vilas v. Page*, 106 N. Y. 439, 451, 453; *C. T. Co. v. Seasongood*, 130 U. S. 482, 492; *W. S. L. & P. R. Co. v. C. T. Co.*, 22 Fed. 269, 271.) So much of the order as denies the

Opinion of the Court, per EARL, J.

motion to set aside the sale is not appealable. (*C. L. Ins. Co. v. Bowman*, 90 N. Y. 654; *Winter v. Eckert*, 93 id. 367; *Goodell v. Harrington*, 76 id. 547.) The motion to set aside the sale was properly denied. (*Wetmore v. S. P. & P. R. Co.*, 3 Fed. Rep. 177.) The failure of the purchaser to pay the full amount of his bid, is not a ground of exception to the referee's report. (*Camden v. Mayhew*, 129 U. S. 73.) By consenting to so much of the order as directed a reference to provide for the manner in which payment for the sale is to be made, the petitioners have waived their right to appeal from so much of the order as confirmed the sale. (*Goodsell v. W. U. T. Co.*, 109 N. Y. 147; *Bennett v. Van Syckel*, 18 id. 481.)

EARL, J. There has been a bewildering maze of legal proceedings affecting the Bankers and Merchants' Telegraph Company and its property, and it is quite possible that wrong and injustice has resulted to some of the creditors of the company. The matters have, in many forms, been before the courts below by actions, receiverships, references, reports, petitions, motions and orders, and it would seem as if no real grievance should now remain unredressed. We certainly can perceive no method, according to the settled practice of this court, for administering relief to the appellant upon this appeal.

The judgment of foreclosure is unassailed and from it we must set out upon an examination of the matters submitted for our consideration. It recites that it appeared, from an affidavit, that the bonds secured by the mortgage foreclosed, and then outstanding, amounted to \$7,102,000, and it ordered that it be referred to a referee named, "to ascertain and report the principal sums due and unpaid on such bonds as may be ascertained and reported by such referee to be secured by said mortgage and the names of the respective persons holding any, and what title to the same, and that the said referee shall also ascertain and report which of the coupons issued with any bonds so certified by the plaintiff are outstanding and entitled to the security of the said mortgage, the names of the respective persons holding any and what title to the same, and the

Opinion of the Court, per EARL, J.

sums due and unpaid on such coupons respectively and in the aggregate, together with the aggregate amount of the sums due and unpaid on all bonds and coupons so secured." It further ordered and adjudged that the mortgaged premises should be sold by the referee "unless previous to such sale the said defendant telegraph companies, or either of them, pay to the plaintiff, or its attorneys, the amount herein found as actually due and payable for principal and interest upon the bonds issued under and secured by the said mortgage to the plaintiff and interest thereon," besides the costs. The referee did not, prior to the sale, report the amount due upon the bonds, and hence the appellant claims that the sale was illegal. It was not expressly ordered that the referee should ascertain the amount of the bonds and make his report before he could sell, and the meaning of the judgment in that respect is not entirely clear. The judgment recites that the amount due upon the bonds appeared to the court, and the premises were ordered to be sold unless "the amount herein (in the judgment) found" — not the amount to be ascertained and reported by the referee — should be paid. It may be inferred that the main purpose of the reference was to ascertain who held the bonds and by what title they were held, with a view to a distribution of the proceeds of the sale, and that the sum named in the judgment was assented to by all parties and accepted by the court as sufficiently accurate for the purpose of the judgment and sale. The court was competent to interpret its own judgment, and by its confirmation of the sale it is shown that it understood that the reference, as to the amount of the bonds, was to be executed after the sale. But if it should be held that the reference ought to have been executed before the sale, so that the mortgagor could pay and thus stop the sale, then the execution thereof before the sale was for the benefit of the mortgagor, and it does not complain. But it is undisputed that valid bonds amounting to several millions were outstanding, and it is clear that no one would have paid the amount due upon the bonds for the purpose of stopping the sale. Besides, it appears that the bondholders have no real interest in the foreclosure

Opinion of the Court, per EARL, J.

or the proceeds thereof, as the entire proceeds will be needed and exhausted to pay claims paramount to the bonds. So in any view the omission to execute the reference before the sale was, at most, a harmless irregularity, affecting no substantial right, and the court below could, at least, in the exercise of its discretion, decline to set aside the sale on that account.

It is further claimed that the referee had no authority under the judgment to execute a deed to the purchaser. But it is implied from the language of the judgment that he was to give a deed, as it provided that the purchaser should be entitled to the possession on the production of his deed, and that the telegraph companies and their receiver should join in the deed. The court below having sanctioned the giving of the deed, and thus construed its own judgment, no ground of complaint on that account remained to this appellant.

The judgment provided that the purchaser at the sale should pay a certain amount of cash, and that the balance of the purchase-price might be paid in receiver's certificates and in bonds secured by the mortgage, and that such certificates and bonds should be received only for the *pro rata* amount the holders of the certificates and bonds would respectively be entitled to receive on the distribution of the proceeds under the decree. Upon the sale the purchaser paid the cash required by the judgment and delivered to the referee what was supposed at the time to be a sufficient amount of certificates to pay the amount bid. It now appears that the certificates thus delivered are insufficient to pay the balance of the purchase-money; but the purchaser gave ample security to pay any balance that might be found due from him, and the court below, in confirming the report of the referee, ordered that the referee should inquire and report to the court what receivers' certificates should have been or should be accepted by him in payment of the purchase-price, and how much if anything is due upon the purchase-price. So we think there is no just ground for complaint because the full purchase-price was not paid before the deed was delivered.

Prior to the sale there was a reorganization agreement, to

Opinion of the Court, per EARL, J.

which the appellant was a party, and it now complains that the purchase was not made in pursuance of that agreement, and that the purchaser has refused to carry that agreement into effect. It would be a sufficient answer to this complaint that the purchaser denies that he was a party to the reorganization agreement alleged by the appellant, or that he agreed to purchase under and in pursuance of that agreement, or that he committed any fraud whatever in the purchase. But if the complaint be well founded, it furnishes no absolute ground for setting aside the sale. The court below could, in the exercise of its discretion, leave the appellant to pursue its remedy by action to enforce any rights it has under the reorganization agreement, or against the reorganization committee, for any breach of contract or violation of trust by them. A few days after the sale it, in fact, commenced an action against the purchaser, the reorganization committee, and the new corporation to which the premises sold had been transferred, to enforce the reorganization agreement and its rights thereunder, and that suit is still pending. The pendency of that suit does not furnish an absolute bar to the relief here claimed by the appellant, and, notwithstanding that, the court below could, in the exercise of its discretion, vacate the sale. But it could give the commencement of that suit its due weight, and, on account thereof, refuse to vacate the sale and leave the appellant to proceed for its relief in that suit. It was not bound to set aside the sale because a reorganization agreement, entered into by some of the creditors of the telegraph company, had been violated, and its discretion could not be controlled by such agreement.

There are other facts which the court could properly give, and probably did give, much influence in considering the application of the appellant. It did not offer to bid for the premises upon a resale any more than the purchaser had agreed to pay, or any sum whatever, and it did not show that any one would bid any more. It delayed, with knowledge of all the essential facts, for nearly two years before making the application, and, in the meantime, the property had gone into

Statement of case.

a new corporation, which had expended large sums of money thereon, and had mortgaged the same to secure bonds, and had issued stock to the amount of millions. If, therefore, the sale should be vacated, it would be impossible to restore the parties to be affected thereby to the *statu quo*, and much irreparable mischief might be done.

So, on the whole case, it is clear that the appellant had no absolute legal right to have the sale set aside, and it cannot be said that the court below was without discretion to deny the application, or that it abused its discretion. That, under such circumstances, we have no jurisdiction to review the order appealed from is familiar law. (*Howell v. Mills*, 53 N. Y. 322; *Peck v. N. Y. & N. J. R. Co.*, 85 id. 246; *Winter v. Eckert*, 93 id. 367; *Dennerlein v. Dennerlein*, 111 id. 518.)

The appeal should, therefore, be dismissed, with costs.

All concur except PECKHAM, J., not voting.

Appeal dismissed.

119	24
133	514

In the Matter of the Petition of A. S. ROSENBAUM to Vacate
an Assessment.

A decision denying an application of one party aggrieved, to vacate an assessment for a local improvement in the city of New York, does not validate the whole assessment, or bind or affect other parties aggrieved by it.

In proceedings to vacate an assessment imposed on the petitioner's property in 1872, on the ground that a portion of the work was done under a contract entered into without advertisement or opportunity for competition, it appeared that in similar proceedings by another petitioner to vacate an assessment on his property for the same improvement, the assessment was sustained. In the former proceedings there was no proof that the price for the work was excessive or unfair, while in this it appeared that on the same day the contract in question was made, contracts for similar work, as to which competition was permitted, were made at a much less price. At the date of the former decision, there was no provision for reducing the assessment without vacating it wholly. *Held*, that the doctrine of *stare decisis* did not make the former decision conclusive in this case.

Statement of case.

Also, *held*, that the act of 1874 (chap. 313, Laws of 1874) did not bar a reduction of the assessment for the illegality complained of, and that an order making such a reduction was proper.

Reported below, 53 Hun, 478.

(Submitted December 9, 1889; decided January 14, 1890.)

APPEAL from order of General Term of the Supreme Court in the first judicial department, made July 9, 1889, which reversed an order of Special Term denying a motion to vacate an assessment on the property of the petitioner for paving Fifty-eighth street in the city of New York, and which reduced the assessment.

The facts so far as material are stated in the opinion.

William H. Clark and *G. L. Sterling* for appellant. This assessment was litigated many years ago, and a decision upon the point now raised was given adverse to the petitioner's claim upon substantially the same evidence. The principle *stare decisis* should be applied. (*Petition of Voorhis*, 5 T. & C. 345; 62 N. Y. 637; *Chase v. Chase*, 95 id. 373; *In re S. J. O. Asylum*, 69 id. 353; *Brennan v. Mayor, etc.*, 47 How. Pr. 178; *Alcott v. T. R. R. Co.*, 26 Barb. 157; *Baker v. Lorillard*, 4 N. Y. 261; *Miller v. Macomb*, 26 Wend. 229; *Greenbaum v. Stein*, 2 Daly, 226; *In re Eager*, 46 N. Y. 100.) If the case is considered on its merits and as *res nova*, the petitioner is not entitled to any reduction. (Laws of 1874, chap. 313.)

Elliot Sandford for respondent. Non-compliance with section 104, chapter 137 of the Laws of 1870 has been held as a ground for reducing assessments by deducting the amount of the unauthorized work. (*In re Mahan*, 20 Hun, 301; 81 N. Y. 621; *In re M. S. Inst.*, 82 id. 142; *In re Merriam*, 84 id. 596; *In re M. G. L. Co.*, 85 id. 528; *In re Eager*, 46 id. 100.) The withholding of part of the work from competition is a substantial error within chapter 312 of the Laws of 1874. (*In re Mahan*, 20 Hun, 301; *In re Emigrant Bk.*, 75 N. Y. 388; *In re M. S. Inst.*, 82 id. 142; *In re Merriam*, 84 id. 596.) A decision upon the question here involved, though made in regard to the same assessment, but not between the

Opinion of the Court, per FINCH, J.

same parties and not affecting the same property, is not controlling, if such decision has subsequently been overruled. (*Butler v. Van Wyck*, 1 Hill, 462; *Zink v. Buffalo*, 6 Hun, 611; *In re Delancey*, 52 N. Y. 80; *Pursell v. Mayor, etc.*, 85 id. 330, 334; *Leavitt v. Blatchford*, 17 id. 544; *Townsend v. Corning*, 23 Wend. 443; *Olcott v. T. R. R. Co.*, 26 Barb. 157, 158; *Curtis v. Leavitt*, 15 N. Y. 184; *Moore v. Albany*, 98 id. 410; *Chamberlain v. Taylor*, 105 id. 196.)

FINCH, J. The petitioner moved to vacate an assessment imposed upon his property in 1872 to defray a proportionate part of the expense of paving Fifty-eighth street, between Sixth and Ninth avenues, in the city of New York. The petition was filed in that year; some proof was sworn to in 1880, and the hearing was in 1888, so that the proceeding seems to have moved with due deliberation over a period of quite sixteen years. The explanation is found in an alleged variation in the opinions of this court upon the facts established.

The proof shows that while a contract was let, after advertisement and upon competition, for paving the streets with a patent pavement called the Stafford pavement, the work of laying bridge-stones or crosswalks was not included, but a contract was made for them with the successful bidder for the other work at the rate of one dollar and forty cents per square foot without advertisement or any opportunity for competition. It was further shown that, on the same day upon which this contract was made, other bids for similar work as to which competition was permitted, ranged from forty cents to one dollar and twenty cents per square foot, and contracts were actually made at one dollar. So that the work of laying the crosswalks was awarded without advertisement or competition, in violation of the provisions of the charter, and solely upon the order of William M. Tweed, the then commissioner of public works.

The corporation counsel made two defenses for the illegality thus established. He introduced in evidence, under the petitioner's objection, the record of a similar proceeding instituted

Opinion of the Court, per FINCH, J.

by John D. Voorhis to vacate as to his property the identical assessment here assailed. The facts shown upon that hearing were those now established, except that there was then no proof that the price per square foot was excessive and unfair. The Special Term vacated that assessment, but the General Term reversed the order (5 T. & C. 345), and this court affirmed that conclusion without an opinion (62 N. Y. 637). Of course, the present petitioner had no motive left to press his claim to the same destructive result, and so permitted it to slumber. After the decision below, but before the affirmance in this court, in the case of another assessment, the same illegality relating to crosswalks came up for consideration. (*In the matter of Eager*, 46 N. Y. 100.) It was then held that the assessment was invalid, because laid without competition and in violation of the city charter. That doctrine has been since repeatedly affirmed. (*In re Merriam*, 84 N. Y. 596.) Nevertheless, the corporation counsel insists that the decision of the *Voorhis* case is conclusive upon the principle of *stare decisis*. Two things are to be said about that. The decision did not validate the whole assessment or bind or affect other parties aggrieved by it. (*Purssell v. Mayor, etc.*, 85 N. Y. 330.) And it should be added that the *Voorhis* case was decided largely upon the ground that the property owners were not shown to have suffered by an unreasonable price, and at a date when there was no provision for reducing an assessment without vacating it wholly. Be that as it may, the *Voorhis* decision does not bind the petitioner, and we must apply the law as, after very much of argument and consideration, it has been finally settled.

But the city takes another ground and insists that chapter 313 of the Laws of 1874 bars a reduction for the illegality complained of. That act forbids the vacating of an assessment on account of certain specified omissions or irregularities "except only in the cases in which fraud shall be shown." We had occasion to determine the meaning of that act in *Matter of the Petition of the Emigrant Industrial Savings Bank* (75 N. Y. 388), and there held that it closed the door upon the named

Statement of case.

irregularities, but had no effect upon a case in which there had been no advertisement and no competition at all. It cannot serve, therefore, to defeat the present application.

It follows that the order of the Special Term which denied the petitioner's application was properly reversed by the General Term whose order should be affirmed with costs.

All concur.

Order affirmed.

In the Matter of the Estate of WEBSTER WAGNER, deceased.

In the Matter of the Accounting of JAMES D. TAYLOR, as
Surviving Executor, etc.

To the extent that a surrogate is given jurisdiction in the administration of the estates of deceased persons, he acts judicially; and while his judicial acts are controlled by the limitations imposed by statute, where in a matter within his peculiar jurisdiction it is claimed that he is divested of all discretion, to justify that conclusion the language of the statute must be incapable of any other interpretation.

The provisions of the Code of Civil Procedure (§§ 2715, 2726, 2727), authorizing a "person interested in the estate" to apply to the surrogate for an order to compel an executor to file an inventory or to account, and requiring the surrogate, in case he is satisfied that the executor is in default in filing a sufficient inventory, to make an order requiring him so to do, or in case he fails "to show good cause to the contrary" to require him to account, and the provision (§ 2514, sub. 11) that where a person interested applies, "an allegation of his interest duly verified suffices, although his interest is disputed," do not make it compulsory upon the surrogate to grant the petition, simply because the petitioner swears that he is interested.

The said provisions do not deprive the surrogate of the discretion and power to pass upon the right of the petitioner to demand the relief sought, and the executor may show, in opposition to the application, that the estate has been settled, and that all the beneficiaries named in the will have received their share and released the executor from all claims; and this being shown, it is the duty of the surrogate to deny the application.

As to the filing of an inventory, the executor is not in the eye of the law "in default" or "a delinquent," and as to the accounting, he does not fail "to show good cause to the contrary" when it appears that the estate has been accounted for and distributed among

119	28
126	900
119	28
137	408
119	28
140	616
119	28
141	546
119	28
152	518

Statement of case.

those entitled thereto; and this, although the accounting and distribution were made out of court.

It seems, where it appears in answer to such an application, that the right of the petitioner has been satisfied and extinguished or barred by a release, and the *factum* of the settlement or release is put in issue by his reply, or it is questioned on the ground of fraud, the surrogate has no jurisdiction to try the issue, and should dismiss the petition, remitting the applicant to his proceeding in a court having general equity power to try it.

Reported below, 52 Hun, 23.

APPEALS from judgments of the General Term of the Supreme Court in the third judicial department, entered upon orders made March 16, 1889, which reversed two orders of the surrogate of the county of Montgomery; one of which required the surviving executor of the will of Webster Wagner, deceased, to make and file an inventory, and the other of which required him to make and file an account of his proceedings.

The material facts are stated in the opinion.

Hiram L. Huston for appellant. The existence or non-existence of a release or similar instrument, or its validity if existing, is immaterial in this proceeding. (Code Civ. Pro., § 2514; *Thompson v. Thompson*, 1 Brad. 24; *Burwell v. Shaw*, 2 id. 322; *Creamer v. Waller*, 2 Dem. 351; *Bonfanti v. Deguerre*, 3 Brad. 429; *Matter of Reed*, 41 Hun, 95; *In re Dunkel*, 10 N. Y. S. R. 213; *Reilly v. Duffy*, 4 Dem. 366; *Harris v. Ely*, 25 N. Y. 141, 142; *Wright v. Fleming*, 76 id. 517.) The paper signed by the widow and Norman L. Wagner expressly excepts the specifically "devised" personal effects, and has relation only to the residuary estate, and so far as it can operate as an acquittance or release, its general words are qualified by the particular recital. (*Jackson v. Stackhouse*, 1 Cow. 122; *McIntire v. Williamson*, 1 Edw. Ch. 34; Bishop on Contracts, § 856; Code Civ. Pro., §§ 1837, 1843, 2743.) It was not a matter of discretion with the surrogate to grant or refuse the relief sought; to refuse it would have been error. (Code Civ. Pro., §§ 2715, 2727.)

Matthew Hale, Essek Cowen and William H. Van Steenberg for respondent. The surrogate had no power upon the plead-

Opinion of the Court, per GRAY, J.

ings and proofs in this case to compel James D. Taylor, as surviving executor, to file an inventory of the personal estate of his testator, or to produce his accounts for settlement. (*Lockwood v. Thorne*, 18 N. Y. 285; *Valentine v. Valentine*, 2 Barb. Ch. 430.) The case was one in which the surrogate might easily have found that the application was not made in good faith and was vexatious. (*Forsyth v. Burr*, 37 Barb. 540.) The surrogate erred in directing Mr. Taylor, as surviving executor of Webster Wagner, to return an inventory of the personal property mentioned in the second clause of said Wagner's will. (*Bevan v. Cooper*, 7 Hun, 117; *Westcott v. Cady*, 5 John. Ch. 334; *De Peyster v. Clendinning*, 8 Paige, 295.) The surrogate could not, on the accounting, try the validity of the release. (*Stillwell v. Carpenter*, 59 N. Y. 414.)

GRAY, J. The appellant asks us to hold it to be immaterial that an executor may, in answer to petitions to compel him to file an inventory, or to render an account, exhibit to the surrogate the evidence of what apparently is a perfect bar to any such right; forasmuch as that officer, it is urged, under the Code provisions, is without discretion in the premises. The claim is made, that the interest of an applicant being sufficiently alleged, or undisputed, the surrogate cannot exercise his judgment in the matter, but is obliged to grant the petitions. Turning to the facts in the record before us we find them to present this case: Webster Wagner left him surviving a widow and five children; and by his will, after making certain specific gifts of real and personal estate, he gave his whole residuary estate to them "to be divided equally between them, share and share alike." He appointed as his executors, his wife, his son Norman (the late husband of this petitioner) and his son-in-law; all of whom qualified; but of whom only one, Mr. Taylor, the son-in-law and the respondent here, survives. In March, 1885, about three years after the probate of Wagner's will, and while all the executors were living and acting, the widow and five children of the deceased united in the execution of an instrument in writing and under their seals; which, after reciting

Opinion of the Court, per GRAY, J.

the provisions of the will, acknowledged the receipt by each of the residuary legatees from the executors of the one-sixth part of the real estate and personal property, not otherwise specifically devised under the will, and acquitted and released the executors of Wagner of all legacies, dues and demands whatsoever under or by virtue of the said will, or against the estate.

It will be remembered that those executors were also three of the six persons who took all of the estate between them. The son Norman died in the year following this settlement, intestate, leaving a widow and children. As administratrix of his estate and the guardian of his children, his widow has made these applications to compel Taylor, the sole surviving executor, to file an inventory and to make an accounting. He opposed her proceedings, upon the basis of the instrument which I have referred to. The petitioner denied its execution and alleged fraud in its procurement; but the surrogate, on the ground that he had no discretion in the matter, granted both of her applications.

If what the appellant is here contending for is to be taken as the correct view of the surrogate's jurisdiction and powers in these matters of administration of estates, then we must not only ignore the spirit for the letter of the statute, but we should have to regard that officer as exercising an authority, which is not moved by his judgment, but may be mechanically set in motion, regardless of the rights of parties. I cannot assent to such a view, where the letter kills. The general jurisdiction conferred upon the Surrogate's Court, in matters relating to the conduct of executors and administrators, would seem meaningless, if not an absurdity, if it did not comprehend the right to decree intelligently, and upon equitable principles, and to order their conduct upon principles of justice and of reason. To the extent that the surrogate is given jurisdiction in the administration of the estates of deceased persons, he acts judicially. His judicial acts are, of course, controlled by the limitations imposed by the provisions of the statute, but where, in matters within his peculiar jurisdiction, it is sought to divest him of all discretion, the language of

Opinion of the Court, per GRAY, J.

the statute, to bear such a construction, must be incapable of any other interpretation. It was said by BROWN, J., in *Seaman v. Duryea* (10 Barb. 523), speaking of the provisions of the Revised Statutes, which empowered surrogates to direct and control the conduct of guardians and other trustees, "to direct and control is to govern and command, and the authority to direct and control their conduct must comprehend the power to compel them to do whatever the law requires they should do, or it comprehends nothing."

Now the power of the surrogate to direct and to govern the conduct of an executor or administrator means to order him to do what is just and lawful, and, in a case where it does not appear either just or reasonable that he should be compelled to do something which is asked of him, I should be strongly inclined to disregard a phrasing, or words, of the statutory provision, which are supposed to give support to the extraordinary claim that, nevertheless, a compulsory decree by the surrogate must issue. We should be unwilling to give so irrational an interpretation to a statutory provision, as to divest the judicial officer of the power to exercise his judgment, in acting upon an application authorized to be addressed to him, in a matter within his special jurisdiction.

It may be conceded that the petitioner is a "person interested in the estate," within the meaning of the particular sections of the Code, in view of her representative capacities; but the question cannot rest there. The fact that the petitioner has, or represents, an interest which, all things being equal, would authorize the surrogate to act upon the application, ought not, legally or rationally speaking, to be sufficient where, in opposition, it is made to appear that the interest in the estate has been extinguished by a satisfaction of the legatee's demand. That view accords better with the reason of the thing, for it is one which refuses to sanction a proceeding apparently useless, and certainly so, if the objection of the executor to the application is well founded. Here the objection is the instrument, which evidences a division of the estate, and a receipt by each person entitled of his or her

Opinion of the Court, per GRAY, J.

full share. Now, as the petitioner stands in the shoes of her intestate, and can have no other or greater interest, or better rights than he had, we should suppose that, until the instrument was adjudged invalid, it ought to bar any proceedings to compel further administrative acts by the personal representatives of Webster Wagner. But reliance is placed on the provisions of the Code of Civil Procedure in support of this argument, which, it is claimed, deny to the surrogate any exercise of judgment in the matter, provided the applicant for his order swears to an interest. Section 2715 of the Code relates to the case of "a creditor or person interested in the estate" applying for an inventory, and it provides that "if the surrogate is satisfied that the executor or administrator is in default, he must make an order requiring the delinquent to return the inventory, or a further inventory; or, in default thereof, to show cause * * * why he should not be attacked." Sections 2726 and 2727 relate to the case of "a creditor or a person interested in the estate" applying for an accounting, and the provision is that if the executor or administrator fails "to show good cause to the contrary, * * * an order must be made directing him to account," etc.

Then subdivision 11 of section 2514 defines the expression "person interested" and provides that where such a person applies for an inventory, an account, etc., "an allegation of his interest duly verified, suffices, although his interest is disputed, unless he has been excluded by a judgment, decree or other final determination." What is there in the language of these sections which makes it compulsory upon the surrogate to grant the petition of a person *prima facie* interested, and deprives him of all discretion, when, in opposition, it appears, in effect, that the estate has been accounted for and distributed? These, obviously, are provisions made for cases of unsettled estates; cases where there is an unfulfilled legal duty resting upon the executor or administrator. But where, as in the case before us, the executor shows a settlement of the estate and its distribution by and between the persons entitled to share in it, I think he has shown himself to be without further duty to

Opinion of the Court, per GRAY, J.

perform. As to an inventory, he cannot be "in default," nor "a delinquent," in the eye of the law, if the estate has been in fact accounted for to and distributed among the legatees; nor, with respect to an application for an accounting, does he fail "to show good cause to the contrary," when those facts are made to appear. Nor does the fact that the accounting and distribution were made out of court affect the question; for there is no policy of the law to be subserved either way. The Code provisions were intended to facilitate the administration of estates, by furnishing a machinery for that purpose, which is equally available to the faithful and diligent executor, as it is to the creditor, on any person interested in the estate, against a recalcitrant and unfaithful representative.

All that is meant by the subdivision of section 2514 referred to, is that the executor or administrator cannot put off or avoid the performance of an unfulfilled legal duty by disputing the sufficiency of the interest of the petitioner; and it has reference to cases where a person interested "may" apply. The petitioner here may be "a person interested," within the definition of the Code, and still not be entitled, as matter of right, to the orders she asks for, while it appears that the estate has been distributed and, on the face of the matter, there would be nothing the executor could or should do. The Code provisions in question do not deprive the surrogate of the discretion and power to pass upon the right of the petitioner to demand an inventory or account, and that is the first question for him to determine, when the matter of such an application comes before him. It is his duty then to deny the petition, if it should appear that the petitioner is not, on the face of the proceedings, entitled to the order, and he should not permit the executor to be uselessly harrassed.

I have examined the cases, to which our attention is called, and I find none which embarrass or conflict with our conclusions. The principle of the decision in some of them recognizes a discretionary right in the surrogate to refrain from exercising the power to require an inventory and account. Such is the case of *Thomson v. Thomson* (1 Bradf. 24), where

Opinion of the Court, per GRAY, J.

is also pointed out the distinction between the jurisdiction of the English ecclesiastical courts, whose decisions were cited, and the more ample jurisdiction of our Surrogate's Courts. No reported case is referred to, and I find none, which holds that on such facts as appeared here, showing a settlement and distribution out of court between all the necessary parties, evidenced by their writings under seal, the executor would, or should, be compelled to go through the farce of filing an inventory and rendering an account, which would lead to nothing and be utterly useless while the writings stood. The law is reasonable in its demands, and no unreasonable intentment should be read in a statute, by which an injustice may be worked, or an absurd result brought about.

The question here is not whether the petitioner is a person who might, ordinarily, insist upon the granting of such petitions; but whether, conceding that as a general proposition, she has the right to set the machinery of the Surrogate's Court in motion, in the face of the apparent evidence of a complete settlement between the executors and all persons interested.

Whatever standing the petitioner has, she obtains through the transmission of rights and interests from the deceased legatee, and, if this paper represents a genuine transaction, is it conceivable that the deceased would have been heard upon such an application, if made by him? He was executor, as well as beneficiary, and could he so dissociate himself in the one capacity from himself in the other, as to entitle himself to be heard by the surrogate to complain of fraud, or other causes, to invalidate the settlement? Evidently that would be absurd. But if impossible for him, why should the difficulty cease to exist when the applicant stands before the surrogate as his administratrix, or as the guardian of his children? It has not disappeared by his death; nor does that event affect the validity of his acts, and the surrogate ought to refrain, in the face of such facts, from exercising his authority and remit the discussion of the questions to the courts having jurisdiction to hear them. In *Gratacap v. Phylfe* (1 Barb. Ch. 485), Chancellor Walworth held, that in the case of an application

Opinion of the Court, per GRAY, J.

by, or in behalf of, a person claiming to be interested in the estate as creditor, legatee, or next of kin of the decedent, the right of the applicant to call for an account may be questioned, and that "the party cited may show, in answer to the application, that the right of the applicant to an account is barred by a release, or otherwise." And the inference is fairly made from the language of the opinion in *Bevan v. Cooper* (72 N. Y. 328), that this court thought the surrogate should refuse to entertain a proceeding, when the question of the validity of a release arises therein, which is beyond his powers to try, and should leave the determination to be first made by the appropriate court.

I think we should hold it as the true exposition of the law in such cases, where an application is made to the surrogate for an order compelling the executor or administrator to file an inventory, or to render an account, and it appears, in answer to it, that the applicant can have no right to such an order, by reason of his interest having been satisfied and extinguished by a settlement and distribution, whether in or out of court, or barred by a release, or otherwise, and the factum of a settlement, or of a release, or any act constituting the bar, is put in issue by the reply of the applicant, that the surrogate should dismiss the petition and remit the applicant to his proceeding in a court having general equity powers to try out such an issue. That power the surrogate does not possess. His powers and duties are prescribed by the Code provisions and his jurisdiction is special and limited to the subjects described by the statute. That general jurisdiction, which comprehends such a power as to nullify and set aside the deeds of parties for fraud, is not comprehended in the express grant of powers, nor is it incidental to the particular authority conferred. The procedure in Surrogate's Courts formerly followed the course of the common law, and now is governed by the system created by the provisions of the Code of Civil Procedure. Neither before did they possess, nor do they now possess, the general powers of a court of equity. (*Bevan v. Cooper*, 72 N. Y. 317; *Stillwell v. Carpenter*, 59 id. 414.)

Statement of case.

I think the General Term were right in holding that no inventory should be required of this surviving executor as to the personal property, which, with the farm on which it was, was given by Webster Wagner to his widow, for her life, by the second clause of his will. She was an executrix of the will, and presumably received and enjoyed the use of this personal property. The executor of her will might, properly enough, be called upon to account for such property by this petitioner, as administratrix of the deceased remainderman, or as guardian of his children; but it would seem monstrous, under all the circumstances of this case, that the surviving executor of Webster Wagner should be held to any accountability in that respect. Several years after the probate of the will the estate was finally settled up between all of the parties and the executors acquitted of all responsibility for any demands under the will. In other words the parties, dealing in fact with themselves, arranged and concluded a settlement and distribution to their own satisfaction, and that, I think, ended the matter.

I think the General Term were right in wholly reversing the orders of the surrogate, and that their judgment and order of reversal should be affirmed, with costs to the respondent.

All concur, ANDREWS, J., in result, except EARL, J., not voting.
Judgment affirmed.

119	87
156	689

CATHARINE L. HERMAN, as Executrix, etc., Respondent, v.
CHARLES H. ROBERTS, Appellant.

H., plaintiff's testator, being the owner of land upon which was a residence built for and used as a gentleman's country seat, obtained from defendant, by purchase and grant, a right of way from said land to a public highway across the farm of the latter, over a piece of land described. The premises of H. had no other connection with the highway than the way thus granted. The land described in the grant, over which the way was granted, was, at the time, rocky and uneven, not adapted to purposes of cultivation, or for a carriage-way, until prepared for that purpose. H. prepared a road-bed, constructed thereon a car-

Statement of case.

riage-way, fences were built on both sides, with openings on either side, so that defendant might cross the road. Defendant thereafter used the road-way for carrying heavy loads of farm produce and utensils over it, thus injuring the road, and also placed stones thereon which obstructed the passage, and he threatened to continue such use whenever he deemed necessary. *Held*, that plaintiff was entitled to an injunction to restrain such improper use of the way; that the grant gave plaintiff, not only a right to an unobstructed passage at all times over the land marked out for the way, but also all such rights as were incident or necessary to such passage; that plaintiff thus acquired the right to enter upon the land and construct such a road as he desired, and to restrict such use of it by the owner of the servient tenement, as was inconsistent with the full and unrestricted enjoyment of his easement; that the full extent of the rights of the grantor was to enter upon the land and do such acts only as should not injure or impair the usefulness of the road so constructed, or its character as a carriage road for private use; also, that the grantee had a right, not only to a free passage over the traveled part, but also over the whole strip granted and enclosed as a way; and that the deposit of stones or other obstructions on any part of the enclosure, in such a way as to interrupt the enjoyment of the easement, was inconsistent with and an infringement upon the grantee's rights, and could properly be prevented by injunction.

But, *held*, defendant was not precluded from the use of the roadway, by passing over or across it in such a manner as not materially to obstruct passage or injure the road-bed.

In considering the extent of the rights of the respective parties in the grant of a right of way, it is not proper to refer to the parol negotiations which preceded or accompanied its execution, but the language of the grant should be regarded, and when that is uncertain or ambiguous, the circumstances surrounding it, and the situation of the parties, with a view of arriving at the true intent of the parties.

(Argued December 11, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 1, 1888, which affirmed a judgment in favor of plaintiff, entered on the decision of the court on trial at Special Term.

This action was brought to restrain defendant from injuring, by alleged improper use, a carriage road which Philip Herman, the plaintiff's testator, had constructed over the lands of the defendant under the grant of the right of way from the defendant to the said Herman.

Statement of case.

The grant was executed and delivered October 30, 1871. By it the defendant granted to Philip Herman a right of way "over the lands of the party of the first part, from the north line of the party of the second part to the public highway, leading from Lewisburgh to the old post road * * * on a line now staked out to be forty feet wide between the fences crossing the lands of the party of the first part;" defendant agreed to build one-half the fence and keep it in repair.

The case showed that, prior to the grant, Herman had a summer residence upon his premises. He wished to have a carriage road down a hillside across the defendant's farm to the Lewisburgh road. The defendant staked out such a line of road as he was willing to grant the right of way for, and thereupon the above grant was executed. It divided defendant's farm, leaving a lot of about two and a half acres upon the westerly side. The main portion of defendant's farm and all his buildings were upon the easterly side. Herman constructed a carriage road, grading, macadamizing and covering it with gravel, at an expense of \$700, and maintained it in good condition down to the commencement of this action. He built a fence upon the westerly side, leaving a gateway in the fence upon the easterly side for the use of defendant. The defendant built a fence upon the easterly side of the road leaving a bar-way in it for his own use.

The court upon trial awarded a perpetual injunction enjoining him "from interfering in any way with the use and enjoyment of the roadway, and for using the same for farming or business purposes in such or any manner as to damage or in any wise injure the roadway, or road-bed as now constructed." Herman having died since the trial, his executrix was substituted as plaintiff.

Further facts appear in the opinion.

Frank B. Lown for appellant. The written instrument purporting to convey "a right of way over the lands of the party of the first part," did not give to Hermann the exclusive right of passage thereover, and did not debar the grantor from

Statement of case.

going on it all times, and using it for all purposes, always not interfering with Hermann's free passage thereover. (Wash. on Easements, 188, 196; *Hudson v. Young*, 4 Lans. 67.) If, however, the court, in construing the rights of the parties is to go outside of the contract, and is to give Hermann something more than the "right of way" called for by the writing, then the trial judge committed error in excluding the testimony offered by the defendant, tending to show that the real agreement and understanding between the parties was as evidenced by their talk at the time of making the contract. (*Outhank v. L. S. & M. S. R. R. Co.*, 71 N. Y. 194; *Arms v. Arms*, 13 N. Y. S. R. 12; *Chapin v. Dobson*, 78 N. Y. 74; *Eighmie v. Taylor*, 98 id. 288.) The judgment cannot be sustained even in part, on the ground that the stone which fell in the roadway, or those which were temporarily placed on the sides of the roadway, constituted obstructions, for these acts, even if purposely done, would be mere trespasses, and an action in equity to enjoin the perpetrator would not lie. (*T. & B. R. R. Co. v. B. & H. T. & W. R. R. Co.*, 86 N. Y. 107.)

J. Newton Fiero for respondent. It is a fundamental principal in the construction of the terms of a grant that when its words are doubtful they are to be taken most strongly against the grantor. (*Kilmar v. Wilson*, 49 Barb. 88; *Bliss v. Greeley*, 45 N. Y. 674; *Atkins v. Boardman*, 2 Metc. 467; *Maxwell v. McAtee*, 9 B. Mon. 21; *Kaler v. Beaman*, 49 Me. 208.) Plaintiff can maintain this action to prevent unfair use of roadway so as to injure it or embarrass plaintiff. (Wash. on Easements, 188, 196; *Cowling v. Higinson*, 4 M. & M. 245; *Hemphill v. City of Boston*, 8 Cush. 195; *Amondson v. Severson*, 37 Ia. 605; *Bakeman v. Talbot*, 31 N. Y. 370; *Burnham v. Nevins*, 144 Mass. 92; *Outhank v. L. S. & M. S. R. R. Co.*, 71 N. Y. 194; *Underwood v. Carney*, 1 Cush. 291; *Dennis v. Sipperly*, 17 Hun, 69; *Olcott v. Thompson*, 59 N. H. 156.) The case demands the application of the maxim: *Sic utere tuo, et alienum non laedas*. (*Hay v. C. Co.*, 2 N. Y. 161; *Prentice v. Geiger*, 74 id. 345; *Van Pelt v. McGraw*, 4 id. 113.)

Opinion of the Court, per RUGER, Ch. J.

RUGER, Ch. J. The evidence in the case was quite conflicting, and the principal dispute on the trial was whether the defendant had so used the plaintiff's right of way, as to injure and impair it, and require the making of repairs thereon to restore its usefulness.

The trial court found, as a matter of fact, "that the defendant has used said roadway for carrying produce and farming utensils upon and along the same *to the injury* and annoyance of plaintiff, and threatened to use the same whenever he deems necessary for such purposes and to use all force necessary for him to pass over such roadway in such manner." The evidence fully supported this finding and tended to show that the defendant had cut up and injured the road-bed by drawing heavy loads over it, and placing stones thereon which obstructed the passage.

Under established rules this court is concluded by this finding and must assume that the defendant had used the roadway in such manner as to injure it and threatened a continuance of such use.

This fact clearly entitled the plaintiff to a remedy by injunction to restrain its improper use. The plaintiff obtained this right of way by purchase and grant from the defendant and it consisted of a piece of land, "as now staked out," across defendant's farm running from the plaintiff's land to the public highway, a distance of about 900 feet and was plainly intended to facilitate the plaintiff's access to the public road from his residence. This residence was built and used as a gentleman's country seat, and had no other connection with this public road than the way thus purchased. The land through which the road was constructed was rocky and uneven and was not adapted to purposes of cultivation or for a carriage road until it had been prepared for that purpose by the plaintiff, which was done at considerable labor and expense. No reservation of a right to use such road by the defendant was incorporated in the deed, and his right to such use depends altogether upon the extent of his interest as the owner of the soil in the servient estate.

Opinion of the Court, per RUGER, Ch. J.

No substantial difference exists between the parties as to the rules of law governing the rights of the respective parties in the premises, and the controversy seems to be reduced to the question whether the use proved, was materially injurious to the road. Both parties have referred, for the law governing the case, to the rule laid down by Washburn in his work on Easements (p. 188), stating that "all that the person having the easement can lawfully claim is the use of the surface for passing and repassing, with a right to enter upon and prepare it for that use," and that "the owner of the soil of a way, whether public or private, may make any and all uses to which the land can be applied and all profits which can be derived from it consistently with the enjoyment of the easement."

The conveyance of the right of way unquestionably gave the grantee not only a right to an unobstructed passage, at all times, over the defendant's land, but also all such rights as were incident or necessary to the enjoyment of such right of passage. (*Bliss v. Greeley*, 45 N. Y. 671; *Maxwell v. McAtee*, 9 B. Mon. 21.) The grantee thus acquired the right to enter upon the land and construct such a road-bed as he desired and to keep the same in repair. He could break up the soil, level irregularities, fill up depressions, blast rocks and not only remove impediments, but supply deficiencies in order to constitute a good road. He had a right to exclude strangers from its use, and to restrict such use of it by the owner of the servient tenement, as was inconsistent with the enjoyment of his easement. The owner of the soil was under no obligation to repair the road, as that duty belongs to the party for whose benefit it is constructed. (2 Washburn on Real Estate, 311; 2 Hilliard on Real Estate, 101.)

In considering the extent of the rights of the respective parties in the grant of a right of way it is not proper to refer to the parol negotiations which preceded its execution or the colloquium accompanying it (*Bayard v. Malcolm*, 1 Johns. 467; *Renard v. Sampson*, 12 N. Y. 561; *Long v. N. Y. C. R. R. Co.*, 50 N. Y. 76); but we are to regard the language of the grant and, when that is uncertain or ambiguous, the circumstances

Opinion of the Court, per RUGER, Ch. J.

surrounding it, and the situation of the parties with a view of arriving at the true intent of the parties, as was said in *Bakeman v. Talbot* (31 N. Y. 370.): "The doctrine that the facilities for passage, where a private right of way exists, are to be regulated by the nature of the case and the circumstances of the time and place, is very well settled by authority." In *Burnham v. Nevins* (144 Mass 92), Morton, C. J., says: "These general principles are that a man who owns land subject to an easement, has the right to use his land in any way not inconsistent with the easement, and that the extent of the easement claimed must be determined by the true construction of the grant or reservation by which it is created, aided by any circumstances surrounding the estate and the parties, which have a legitimate tendency to show the intention of the parties." (See, also, *Onthank v. L. S. & M. S. R. R. Co.* 71 N. Y. 194.)

Under these rules it is obvious that the rights of the owner of the easement are paramount to the extent of the grant, and those of the owner of the soil are subject to the exercise of such rights. It cannot be assumed, in the absence of any provisions looking thereto in the grant, that the grantor intended to reserve any use of the land which should limit or disturb the full and unrestricted enjoyment of the easement granted. The purpose contemplated by the grant was the creation of an easement for the plaintiff's use, and not the reservation to the owner of the use of his land. Every use by the owner was abandoned except such as might be made in a mode entirely consistent with the full and undisturbed enjoyment by the grantee of the easement. The idea of a joint use of the land by both parties, in the sense that a use by the grantee should at any time give way to a use by the grantor, is contrary to the plain meaning and intent of the grant. It cannot be supposed that the grantor when conveying a right of way over an impassable tract of land intended to restrict his grantee from changing its surface so as to make it passable and available for the purpose of a road, or that, after the road had been so constructed, he had the right to

Opinion of the Court, per RUGER, Ch. J.

enter upon the land and impair its usefulness, or impose upon the grantee the duty of keeping such impaired road in repair for the benefit of the grantor. The full extent of the rights of the grantor in the soil of the road was to enter thereon and do such acts only as should not injure or impair the enjoyment of the easement by the grantee, and when he went beyond such use, he transcended the rights pertaining to his character as the owner of the soil. The general character of these rights is familiar to all owners of land, because they are common to all whose lands abut upon public roads, and they are varied only by the character of the easements enjoyed, and the terms of the grants under which they are possessed. Unless, therefore, something can be found in the terms of the grant which modifies the easement created, that must be held to be the measure of the rights of the parties. No inference can be drawn from the present grant that it was intended that the grantor should enjoy the unrestricted use of the road with the privilege of so wearing and using it as to subject the grantee to the labor and expense of keeping it in repair. It is apparent, from the character of the property affected and the use to be made thereof, that the plaintiff expected to construct a carriage road for access to and communication with his residence as a gentleman's country seat. It could not have been contemplated by the parties that such a road was to be used for farming purposes, to draw heavy loads over, and cut it up by the use of the various appliances needed for such purposes. The land over which the road was laid out had never before been so used and the owner of the soil had theretofore obtained access to his land from the public road by entering upon and traveling over it in other places. The land itself was of small compass and little value, as it was hilly, rocky, sterile and unadapted to agricultural uses, and it could not, under the circumstances, have been intended that the road was to be built and used to any considerable extent for farming purposes by either the grantor or grantee. The building of fences on both sides of the road showed an intention to preserve it from indiscriminate use and while the construction of a bar-way on either side

Opinion of the Court, per RUGER, Ch. J.

manifested a design that the defendant might thereby have access to his land and cross the road, it was not intended, we think, to give him liberty to so use the road as to impair or destroy its usefulness or character as a carriage road for private use. The right of way granted was to be forty feet wide and the grantor had a right thereunder, not only to a free passage over the traveled part, but also, to a free passage over such portion of the land, enclosed as a way, as he thought proper or necessary to use. (*Herrick v. Stover*, 5 Wend. 580; *Drake v. Rogers*, 3 Hill, 604; Wood's Nuisances, § 260.) The deposit of stone or other obstructions on such enclosed space in such a way as to interrupt the enjoyment of the easement, constituted an obstruction which was inconsistent with the rights possessed by the grantee, and could be properly prevented by injunction. The use of such land for agricultural purposes; the raising of crops or the deposit of materials thereon, except, perhaps, for temporary purposes, was clearly inconsistent with the rights conveyed by the grant.

It is difficult, if not impossible, to lay down a clear and definite line of use which shall enable the parties always to determine what may be considered a proper and reasonable use as distinguished from an unreasonable and improper one, and such questions must, of necessity, be usually left to the determination of a jury, or the trial court, as a question of fact. (*Bakeman v. Talbot*, 31 N. Y. 366; *Huson v. Young*, 4 Lans. 64; *Prentice v. Geiger*, 74 N. Y. 342.)

It is not supposed that it was the intention of the court below to wholly preclude the defendant from the use of the roadway by passing over or across it in such manner as should not materially obstruct passage, or injure the road-bed; but it was only intended to prevent an unreasonable use thereof which should sensibly impair its condition or render its use offensive and impracticable to the plaintiff and others having lawful occasion to pass over it.

We think the findings of the trial court are conclusive upon us as to the proper use of the road by the defendant, and that an injunction was properly awarded against him. Some

Statement of case.

of the members of this court are, however, apprehensive that the order made by the court below is not sufficiently explicit and may be subject to misunderstanding and misconstruction. We have, therefore, thought best to change its form, so as to express more clearly the rights and duties of the respective parties. The words "wilfully or unreasonably" should be inserted after the word "interfering" in the sixth line of the order in the place of the words "in any way;" and also after the word "as" in the ninth line of said order.

With these modifications the judgment should be affirmed with costs.

All concur, ANDREWS, J., in result, except FINCH, J., dissenting.

Judgment accordingly.

PITTSBURG CARBON COMPANY (Limited), Appellant, v. FRANK C. McMILLIN as Receiver, etc., Respondent.

In 1887 plaintiff, with other corporations engaged in the manufacturing of carbon, entered into a contract with H., the object of which was, by a combination, to vest in H., as a common trustee, the management and control of the business of manufacturing and selling their products. The several companies agreed to lease to such trustee their respective factories, and operate them under his direction. He was to designate the kind of goods to be manufactured, fix the prices at which and the persons to whom they should be sold, and, after paying expenses, divide the net proceeds and profits as provided in the contract. When this contract was made plaintiff had an outstanding contract to furnish carbons to the B. E. L. Co. from time to time. Plaintiff assigned to H., as such trustee, all existing contracts, and he assumed their performance. Carbons manufactured at plaintiff's factory in April, May and June 1887, were billed in the name of H., and delivered under said contract to the B. E. L. Co. About July, 1887, plaintiff refused to continue in the combination, and an action was commenced against the trustee and the contracting corporations to dissolve the same, which resulted in the appointment of defendant as receiver of its property. In an action brought by plaintiff to recover for said carbons, the B. E. L. Co. paid the amount into court. The court found that the contract to combine was made for unlawful purposes, and was illegal; that the trust was then insolvent, and its assets, including the claim against the B. E. L.

Statement of case.

Co., insufficient to pay its creditors. *Held*, that, as between the plaintiff and the receiver, the latter was entitled to the fund; that plaintiff stood in the position of a party to an illegal contract claiming a fund, which, if the contract was valid, belonged to the trust combination, and to sustain the action would permit it to escape from the operation of the rule which denies affirmative relief to a party to an illegal contract. As to whether, if the B. E. L. Co. had not paid the funds into court, plaintiff could have enforced a recovery against it, although there was no adverse claimant *quære*.

A receiver of an insolvent corporation unites in himself, not only the rights of the corporation, but those of creditors; he may, in the interest of creditors, assert a claim which he might be unable to do, as a representative solely of the corporation, and he may disaffirm dealings of the corporation in fraud of the creditor's rights.

Reported below, 53 Hun, 67.

(Argued December 12, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 29, 1889, which affirmed a judgment in favor of defendant, entered upon a decision of the Court on trial at Special Term.

This action was originally brought by plaintiff against the Brush Electric Light Company to recover for carbons alleged to have been delivered to it during the months of April, May and June, 1887, under a contract between the parties.

By order of interpleader, defendant, who claimed the amount due as receiver of the united carbon companies, was substituted as defendant, and the money was paid into court. On March 1, 1887, plaintiff entered into a contract with Edward C. Hawk, as trustee, and with other companies engaged in the manufacture of carbon, by the terms of which plaintiff leased to said trustee its carbon works machinery for the term of five years, and agreed not to engage in the business during the continuance of the contract, except in accordance with its terms. At the request of the trustee plaintiff agreed to run its works under the direction of the trustee, the latter paying for material, labor, etc., and also a sum agreed upon for rent and a ratable proportion of the net profits. The trustee was given power to designate what factories of the

Statement of case.

parties to the combination should be run, the kind or class of goods to be made, to fix the price of the goods manufactured, and to whom sold, and the terms of sale, to audit bills, etc. The trustee also agreed to carry out all of plaintiff's valid existing contracts. The contract was not to be binding on plaintiff until some other companies had entered into similar contracts with the trustee.

The further facts, so far as material, are stated in the opinion.

E. S. Crosser for appellant. The trust contract was null and void and could not in any way be ratified. (Bishop on Cont. 469, 471, 473; 3 A. & E. Ency. of Law, 872; 9 id. 880; *Thorne v. T. Ins. Co.*, 80 Penn. St. 15; *Shisler v. Vandike*, 92 id. 447; *S. C. Bank v. King*, 44 N. Y. 87; *Arnot v. P. C. Co.*, 68 id. 558; *Stanton v. Allen*, 5 Denio, 434.) There can be no estoppel against asserting the invalidity of the trust contract. (Green. on Pub. Pol., Rule 126; *Wheeler v. Wheeler*, 5 Lans. 355; *Langan v. Sankey*, 55 Ia. 52; *Snyder v. Wyley*, 33 Mich. 483; *Stevens v. Wood*, 127 Mass. 123; 2 Kent's Com. 466; *Bredin's Appeal*, 92 Penn. 241.) The facts found do not invoke the extraordinary remedy of estoppel. The essential elements of estoppel are not found. (Bishop on Estop. [4th ed.] 679; *Edmunson v. Thompson*, 31 L. J. Exch. 207; *Merrill v. Tobin*, 30 Fed. Rep. 728, 743; *Hamlin v. Sears*, 82 N. Y. 327, 333; *Andrews v. A. L. Ins. Co.*, 85 id. 334.) The receiver represents the trust combination, with no better title to this claim than that of a voluntary assignee. His title is derived solely from the trust combination, with all previous equities and iniquities still attached thereto. (8 R. S., art. 3, § 68; *Curtiss v. Leavitt*, 15 N. Y. 9, 46, 47, 254, 296; *Cutting v. Damarel*, 88 id. 410, 418; *Honegger v. Wettstein*, 94 id. 253, 260; *Williams v. Babcock*, 25 Barb. 109; *McHarg v. Donnelly*, 27 id. 100; *Bell v. Shibley*, 33 id. 610; *Receivers v. P. G. Co.*, 3 Zab. 283, 292; *Symes v. Hughes*, L. R. [9 Eq. Div.] 474; Greenhood on Public Policy, Rules 2, 10, 42; High on Receivers, §§ 245, 315; Beach on Receivers, §§ 699-706; Story Eq. Jur., § 831.) The respondent's position is not

Statement of case.

strengthened by urging the claims of the creditors of the trust, and by relying on their real or supposed innocence. The burden was on these creditors of ascertaining the nature of the trust, and the limits of the trustees' authority. (*Swan v. P. Bank*, 24 Hun, 577; *Smith v. Anderson*, L. R. [15 Ch. Div.] 247; *Cary v. Gregory*, 6 J. & S. 127; *Austin v. Monroe*, 47 N. Y. 360; *New v. Nicholl*, 73 id. 130; *Storrs v. Flint*, 14 J. & S. 498.) The appellant's right to recover this fund antedates the trust contract and is clear of all its taint; and the respondent to succeed must plant himself squarely upon the said contract and secure the aid of the court to enforce the same. (*Keene v. Kent*, 4 N. Y. S. R. 429; Bishop on Cont. § 469; Pomeroy Eq. Jur. § 401, 940; Wharton on Cont. § 349; *Steers v. Lashly*, 6 Term Rep. 61; *Sykes v. Beadon*, L. R. [11 Ch. Div.] 170; *Armstrong v. Toller*, 11 Wheat. 258; *Thompson v. Thompson*, 7 Ves. 470; *Snell v. Dwight*, 120 Mass. 9; *Dunham v. Presby*, Id. 285; *M. R. C. Co. v. B. C. Co.*, 68 Penn. 173, 188.)

Ansley Wilcox for respondent. Appellant cannot set up the illegality of its own contract as against the receiver who represents not only itself and the other parties to the contract but *bona fide* creditors, who have dealt with the trust or combination and have given credit to it in the ordinary course of business. (Laws of 1858, chap. 314; *Attorney-General v. G. M. L. In. Co.*, 77 N. Y. 272; *Talmage v. Pell*, 7 id. 328, 346, 347; *F. & M. Bank v. Jenks*, 7 Metc. 592; *Honegger v. Wettstein*, 15 J. & S. 125, 136, 137; 94 N. Y. 252; *Litchfield Bank v. Church*, 29 Conn. 150; *Alexander v. Rolfe*, 74 Mo. 516; *Osgood v. Laytin*, 3 Keyes, 521; *Osgood v. Ogden*, 4 id. 70; Broom's Leg. Max. 279, 288; *L. Bank v. Church*, 29 Conn. 150; Lindley on Part. [Eng. ed.] 201, 205; Metc. on Cont. 116; *Adams v. Creditors*, 14 La. 461; *Kinsman v. Parkhurst*, 18 How. [U. S.] 293; *Murray v. Vanderbilt*, 39 Barb. 140, 152; Whart. on Agency, §§ 25, 26, 249, 250, 320, 474, 542; Morawetz on Corp. § 750; Pomeroy's Eq. Juris. § 804; *Keene v. Kent*, 7 N. Y. S. R. 229,

Opinion of the Court, per ANDREWS, J.

232; *Brooks v. Martin*, 2 Wall. 70, 81; *Marsh v. Russell*, 66 N. Y. 288, 294; *Wann v. Kelly*, 5 Fed. Rep. 584; *W. U. T. Co. v. U. P. R. R. Co.*, 3 id. 423; *C. T. Co. v. O. C. R. R. Co.*, 23 id. 306.) Findings of fact will be presumed, and the findings made will be construed so as to support the conclusions of law. (*Tomlinson v. Mayor*, 44 N. Y. 601; *Phillip v. Gallant*, 62 id. 256; *Parker v. Baxter*, 86 id. 586; *Bennett v. Bates*, 94 id. 354; *Health Dept. v. Purdon*, 99 id. 237; *People v. Bank of N. A.*, 75 id. 560.) The illegality of a contract sued upon, where it does not necessarily appear upon the face of the contract itself, or from the proof offered to establish the contract, can only be proved under a pleading specially alleging the illegality. (*May v. Burras*, 13 Abb. [N. C.] 384; 94 N. Y. 252.)

ANDREWS, J. The finding that the contract of March 1, 1887, between the plaintiff and Edward S. Hawks, as trustee for the plaintiff and other carbon companies, was made for unlawful purposes and was illegal, was not excepted to, and is to be taken as an incontrovertible fact on this appeal. The ground of illegality is not expressly stated, but it is clearly to be inferred from the other findings and the opinion of the trial court that the contract was held to be illegal for the reason that it was entered into in furtherance of an unlawful combination between the plaintiff and other carbon companies in restraint of trade. The scheme of the parties to the combination was to vest in a common trustee the management and control of the business of manufacturing and selling carbons for electric lighting theretofore carried on separately by the companies forming the combination. To this end the several companies were to lease to the trustee their respective factories, and to operate them under the direction of the trustee, who was to designate the kind of goods to be manufactured, fix the prices at which and the persons to whom they should be sold, purchase all materials and supplies, collect the bills, and pay out of the common fund the cost of production, and divide the net proceeds and profits of the business between the several

Opinion of the Court, per ANDREWS, J.

parties to the combination in a ratio fixed by the contracts of the respective companies with the trustee. The plaintiff, when the contract of March 1, 1887, was made, had an outstanding contract to furnish carbons to the Brush Electric Light Company from time to time, and in its contract with the trustee the plaintiff assigned to him all existing contracts, and the trustee assumed their performance.

The sum in controversy in this action has been paid into court by the Brush Electric Light Company, being the purchase-price of carbons manufactured and delivered to that company in April, May, and June, 1887. They were manufactured at the plaintiff's factory, but were billed in the name of the trustee, and delivered in performance of the contract between the plaintiff and the Brush Electric Light Company, which the trustee had assumed. In or about July, 1887, the plaintiff refused to continue any longer in the combination. Thereupon an action was commenced in the Court of Common Pleas for Cuyahoga county, in the state of Ohio, the headquarters of the combination, by some of the members of the combination, against the plaintiff and other members thereof, to dissolve and wind up its affairs, and the proceedings resulted in the appointment of the present defendant as receiver of the property and assets of the trusteeship, with power, among other things, to take possession thereof, to collect the assets and pay and adjust claims arising out of the business. No question is made on this appeal as to the jurisdiction of the Ohio court to entertain the proceeding and make the order appointing the receiver, and it is found that the receiver duly qualified and entered upon the discharge of his duties. It is also found that at the time of the appointment of the receiver the trust was insolvent and that all the assets of the trust business, including the claim against the Brush Electric Light Company, are insufficient to pay its creditors.

The plaintiff stands in the attitude of a party to an illegal contract, claiming a fund which, if the contract was valid, would clearly belong to the trust combination, and not to the

Opinion of the Court, per ANDREWS, J.

plaintiff, as one of its members. The plaintiff has no standing to claim the fund in opposition to the clear import of the trust agreement, unless its repudiation of the contract in July, 1887, operated to make the plaintiff the vendor of the carbons delivered to the Brush Electric Light Company during the time the plaintiff remained a party to the combination. The carbons, it is true, were delivered in performance of the plaintiff's agreement made before the combination was formed. But the trustee assumed performance by contract with the plaintiff, and the Brush Electric Light Company accepted performance by him. To permit the plaintiff to treat the debt as a debt owing to it, and not to the trustee, would enable the plaintiff to escape from the operation of the rule which denies relief to a party to an illegal transaction. The plaintiff had a right to repudiate the contract of March 1, 1887. Its stipulations could not have been enforced against the plaintiff. The plaintiff, notwithstanding the contract, could have sold its carbons to the Brush Electric Light Company on its own account, and have received pay for them. But it did not do so. The agreement of March 1, 1887, was carried out in part. The carbons were manufactured by and for the trustee representing the combination, and were delivered to the purchaser as the property of the trust by the consent of the plaintiff, and the purchaser became the debtor of the trust, and not of the plaintiff. The repudiation of the trust agreement by the plaintiff after this transaction did not purge its previous participation in the illegal scheme. If the Brush Company had not voluntarily paid the fund into court, it would be a grave question whether the plaintiff could have enforced a recovery against that company, although there was no adverse claimant. (See *Dewitt v. Brisbane*, 16 N. Y. 508; *Johnson v. Bush*, 3 Barb. Ch. 207; *Talmage v. Pell*, 7 N. Y. 328.)

But, as between the plaintiff and the receiver of the trust combination, the latter is, we think, clearly entitled to the fund. It is claimed that no action could have been maintained by the trustee, representing the trust combination, against the Brush

Opinion of the Court, per ANDREWS, J.

Electric Light Company, to recover the purchase-price of the carbons, for the reason that the illegality of the combination would have constituted a good defense. Assuming this predicate, it is asserted that the receiver stands in the same position, and that his title is subject to the same infirmity as that of the combination which he represents. Without considering the assumption upon which this proposition is based, it is a sufficient answer to the proposition asserted, that the receiver unites in himself the right of the trust combination, and also the right of creditors, and that he may assert a claim as the representative of creditors, which he might be unable to assert as a representative of the combination merely. The general rule is well established that a receiver takes the title of the corporation or individual whose receiver he is, and that any defense which would have been good against the former, may be asserted against the latter. But there is a recognized exception, which permits a receiver of an insolvent individual or corporation, in the interest of creditors, to disaffirm dealings of the debtor in fraud of their rights. (*Gillet v. Moody*, 3 N. Y. 479; *Porter v. Williams*, 9 id. 142; *Curtis v. Learitt*, 15 id. 9, 108.) Assuming that the trustee could not have recovered of the Brush Electric Light Company for the reasons suggested, it would be a very strange application of the doctrine that no right of action can spring from an illegal transaction, which should deny to innocent creditors of the combination, or to the receiver who represents them, the right to have the debt collected and applied in satisfaction of their claim. The just rule of the common law, that courts will not lend their aid to enforce illegal transactions at the instance of a party to the illegality, would be misapplied if permitted to be used to prevent the application of the fund in question to the payment of creditors of the combination.

We think the judgment is right, and it should, therefore, be affirmed.

All concur.

Judgment affirmed.

Statement of case.

DAN. S. RICHARDS et al., as Assignee, etc., Respondent, v.
ELMINA LA TOURETTE et al., Appellant.

119	54
135	226
136	167

119	54
155	405

In an action to foreclose a mortgage held by plaintiffs, as assignees for the benefit of creditors of the mortgagees, defendant M., who had purchased the premises subject to the mortgage, sought to set off a claim against plaintiff's assignors. It appeared that at the time of the assignment to plaintiffs, the debt secured by the mortgage was not due; that the assignors were insolvent and M. endeavored to have his debt, which was due, applied by them upon the mortgage before it [was] assigned. *Held*, that he was equitably entitled to the set-off; that it was not necessary that the mortgage debt should have been due, as by seeking to have the debt due him applied thereon, M. had treated it as due and so waived any defense he might have based upon the fact that it was not due; that he had a right so to do and to require the set-off.

Chance v. Isaacs (5 Paige, 592); *Bradley v. Angel*, (3 N. Y. 475); *Myers v. Davis* (22 id. 492); *Martin v. Kunzmüller* (37 id. 397); *Jordan v. N. S. & L. Bk.* (74 id. 470); *Munger v. A. C. N. Bk.* (85 id. 580), distinguished. *Richards v. Village of Union* (48 Hun, 263), overruled.

The distinction between this case and one where the debt owing by the insolvent to the party desiring to avail himself of the set-off is not due, pointed out.

A certificate of deposit issued by the assignors, who were bankers, was part of the amount M. sought to have offset against the mortgage; this had never been presented and a demand made for its payment at the banking-house of the assignors. *Held*, that a technical demand was not necessary in a case like this, where the set-off is claimed not as matter of law, but of equity; that the claim of set-off may be regarded as a demand, and should have relation to the time the assignment to plaintiffs was made, so far as to give form and life to the claim that the debt of the insolvents was then due.

It also appeared that M., after the assignment, recovered a judgment against the assignors for the amount of his debt, whereon an execution was returned unsatisfied. *Held*, that M. did not thereby lose his right of set-off.

Richards v. La Tourette (53 Hun, 623), reversed.

(Submitted December 12, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 20, 1889, which reversed a judgment in favor of the defendant Mersereau, and granted a new trial.

Statement of case.

This was an action to foreclose a mortgage given by the defendant Elmina La Tourette to Martin C. Rockwell in 1880.

In 1884 the said defendant conveyed the mortgaged premises to the defendant Edward C. Mersereau, Mersereau assuming and agreeing to pay the mortgage as part of the purchase-price. In 1885, Martin C. Rockwell and Melvin C. Rockwell, individually, and Martin C. Rockwell & Company, private bankers at the village of Union, Broome county, made a general assignment for the benefit of creditors, to the plaintiffs. Among the assets was the mortgage and the accompanying bond; at the time the assignment was made, Mersereau held a certificate of deposit for \$267.73, and interest, issued by said banking-house and had moneys on deposit with it amounting to \$193.51, the amount of which certificate and moneys he claimed should be set off in reduction of the amount unpaid upon said bond and mortgage. No part of the principal or interest of the bond and mortgage was due at time of the assignment.

Mersereau, prior to the assignment, requested the mortgagee to set off such certificate and moneys and apply them upon the mortgage. This he refused to do, upon the ground that the mortgage was not due.

Further facts are stated in the opinion.

E. C. Moody for appellants. The referee properly found, as a conclusion of law, that no partnership existed between Martin C. Rockwell and Melvin C. Rockwell, in said banking business, at any time after the execution of the writing between them, dated September 21, 1875, but that Martin C. Rockwell was the real owner of said business, and conducted the same without reference to said Melvin C. Rockwell. (3 Kent's Com. 24, 25, 28; Parsons on Part. 6, 54; Story on Part. §§ 2, 15, 18, 23; *Clift v. Barrow*, 108 N. Y. 192; *Salter v. Ham*, 31 id. 321; *Champion v. Bostwick*, 18 Wend. 175; *Vanderbury v. Hall*, 20 id. 70; *Briggs v. Vanderbilt*, 19 Barb. 222; *Griswold v. Waddington*, 16 John. 489; *Bennett v. Snyder*, 81 N. Y.

Statement of case.

550.) The agreement between Martin C. Rockwell and Melvin C. Rockwell was an executory contract, and does not amount to an agreement for a partnership. (Parsons on Part. 6; 3 Kent's Com. 24; Story on Part. § 2; *Richardson v. Hughitt*, 76 N. Y. 58; *Burnett v. Snyder*, 81 id. 550; *Cassidy v. Hall*, 97 id. 159, 168; *Curry v. Fowler*, 87 id. 33; *Clift v. Barrow*, 108 id. 192, 194.) If it could be held there was a partnership between Martin C. Rockwell and Melvin C. Rockwell, called "M. C. Rockwell & Co.," it is a well settled principle of law, "that insolvency, either of the whole partnership, or of an individual member, dissolves a partnership." (3 Kent's Com. 58; *Sterritt v. T. N. Bank*, 46 Hun, 22.) Investments in the name of Martin C. Rockwell are a part of the partnership property, and "equity will consider it converted into personalty, for the purpose of subjecting it to the debts of the firm in preference to the debts of individual partners," and as investments made in trust for the partnership. (*Smith v. Smith*, 5 Ves. 189; *Bank of Grote*, 18 J. & S. 275; *Sage v. Sherman*, 2 N. Y. 428; *Columb v. Read*, 24 id. 505, 511; *Hiscock v. Phelps*, 49 id. 97; *Mitchell v. Reed*, 61 id. 123; *Fairchild v. Fairchild*, 64 id. 476, etc.; *Rosenburg v. Block*, 102 id. 205.) The assignees in this action took the property of Rockwell, and with it the Mersereau mortgage, just as it stood on March 9th, 1885; and such property and mortgage was subject, in the hands of the assignees, to all set-offs, counter-claims and equities that existed on the day of the assignment, between Martin C. Rockwell, an insolvent, and any of his debtors or creditors. (*Acer v. Hotchkiss*, 97 N.Y. 409.)

Chapman & Lyon, for respondents. Defendant Mersereau is not entitled to the set-off claimed, as at the time of making the general assignment, there was nothing whatever due upon the bond and mortgage. (*Richards v. V. Union*, 48 Hun, 263; Code Civ. Pro. § 502; *Jordan v. N. S. & L. Bank*, 74 N. Y. 470; *Munger v. A. C. N. Bank*, 85 id. 580.) There was nothing due upon the bond and mortgage nor upon the certificate of deposit. (*Munger v. A. C. N. Bank*, 85 N. Y.

Opinion of the Court, per PECKHAM, J.

586; *Seymour v. Dunham*, 24 Hun, 93; *Smith v. Felton*, 43 N. Y. 419.) Even if defendant Mersereau had the right, on the day the general assignment was made, to have a certificate of deposit not due set off against a bond and mortgage not due, he, having put that claim into judgment, has not that right now. (*R. C. Co. v. Dimock*, 90 N. Y. 33-36.) There can be no set-off of these claims for the reason that the bond and mortgage were property of Marvin C. Rockwell individually, while the claims sought to be used as a set-off were against Martin C. Rockwell & Company. (*Clift v. Barrow*, 108 N. Y. 187-191.)

PECKHAM, J. The order of the General Term in this case should be reversed.

The court below was entirely right in saying that the single question involved herein is, whether the defendant Mersereau was entitled to set off the claim which he held against the Rockwells, as against the mortgage which the plaintiffs as assignees seek to foreclose. The General Term has denied this right on the sole ground that, at the time of the assignment by the Rockwells to the plaintiffs herein, the debt to the Rockwells upon the mortgage was not due. It was not necessary that it should have been due in order to permit the offset. The debt from the assignors Rockwell, who were insolvent, was due at the time that they made the assignment; and the debt upon the mortgage in favor of the Rockwells, although not due at the time of the assignment was nevertheless treated by the debtor as due, and he waived any defense based upon the fact that the mortgage was not due, by endeavoring to have the debt due to him offset against it. It is not claimed that this offset comes within the statute in regard to offset, where it would be allowed in a court of law. It is allowed upon equitable principles by a court of equity for the furtherance of justice, and in carrying out what such a court states is one of the principles which guides it, viz.: The principle of offsetting cross demands against each other, in which, as it is stated, there is a natural equity.

Opinion of the Court, per PECKHAM, J.

This case cannot be distinguished in principle from that of *Rothschild v. Mack* (115 N. Y. 1). In that case the debt to the insolvent was not due at the time of the assignment; and still it was held that the debt due from the insolvent at the time of the assignment was properly offset against the debt to him. It was in that case stated that it has been frequently held that as to the right of set-off in equity, the fact that the debt owing to the insolvent is not due when he makes the assignment, is entirely immaterial. The cases of *Lindsay v. Jackson* (2 Paige, 581) and *Smith v. Felton* (43 N. Y. 419) are cited in support of this proposition. *Chance v. Isaacs*, (5 Paige, 592) is distinguished, and it is seen that in that case the mere fact that the debt to the insolvent was not due, would have furnished no excuse for refusing an offset.

The cases cited by the learned judge at General Term, are not, we think, in point. They are *Bradley v. Angel*, (3 N. Y. 475); *Myers v. Davis* (22 id. 492); *Martin v. Kunzmüller*, (37 id. 397); *Jordon v. National Shoe & Leather Bank* (74 id. 470); *Munger v. Albany City National Bank* (85 id. 580). In most of those cases the debt from the insolvent to the party desiring to avail himself of the set-off was not yet due, and it was in regard to such a debt that Judge GARDNER said, "by allowing a set-off in this case, the executors would be deprived of the legal right secured to the testator by contract and the complainants would obtain payment of their debt before it became due, to the prejudice of other creditors of the decedent." (*Bradley v. Angel, supra.*) In that case the plaintiffs owed a debt which was then due to the decedent's estate and the debt from the decedent's estate was not due at the time of the commencement of the action, and would not become due in some time thereafter. The action was commenced to compel the executors to offset their claim against the plaintiffs, by the claim of the plaintiffs against the estate, which was not yet due. This the court held could not be done either under the statute relating to set-off, or by virtue of the jurisdiction of a court of equity to adjudge a set-off in furtherance of justice. The distinction is of course very obvious. To allow a set-off

Opinion of the Court, per PECKHAM, J.

against an estate of an insolvent by setting off a debt from that estate, not yet by the terms of the contract due, as against a debt then immediately due to the estate, is to effect a change in the contract between the parties, and in the most vital and material portion of it, in order to meet, as is stated by Judge GARDNER a supposed equity arising from matters *ex post facto*. Whether it be equitable or not, the power of a court might well be doubted to absolutely change a contract entered into by the parties, without the consent of the one who was to make the payment at the time and in the manner prescribed by the contract.

But where a debt is due from the insolvent, and it is a debt from the other party to the insolvent which is not due, the court does not change the contract against the will of the parties, but it simply takes the waiver of the debtor whose debt is not yet due, and only by his consent and at his request treats it as due at once. Where the insolvent holds a demand against his creditor, not due, he has no right to retain it as an investment. (*Bradley v. Angel, supra.*) All of his estate is to be used at once for the payment of his debts, and the party who owes the debt which has not yet matured under the circumstances of the insolvency, and where third persons are not injured, has the right, if he desire it, to treat his obligation to the insolvent as due at once, and, therefore, if the insolvent's debt to him is also due, he has the right to offset the two demands.

The case of *Jordan v. Natl. Shoe, etc., Leather Bank (supra)*, is entirely in accord with these principles. Judge FOLGER, in that case, said there was no foundation for the defendant's claim that it had a banker's lien on the funds of the depositor to secure the payment of a debt from the depositor not then due. It was a case, he said, which was to be decided on the statute of set-off, and upon that statute there would be no pretense that it could be allowed. The opinion, however, distinctly recognizes the power of the court to compel a set-off independently of any statute, if facts for equitable interposition should be shown. None was pretended in that case. Insolvency

Opinion of the Court, per PECKHAM, J.

was neither alleged nor proved, and the learned judge closed his opinion with the remark, that if there were any circumstances existing which render it inequitable to deny him a set-off, he may set them up in the action on the demand against himself, and invoke the equity power of the court for that purpose.

In *Munger v. Albany City Natl. Bank* (*supra*), the same general principles were also recognized. In that case the note in regard to which the principle of set-off was to be applied, was transferred by a Rochester to the Albany bank, before it became due, and the latter took it in the ordinary course of business, in good faith and for a valuable consideration, and without notice of any claims in regard to it or offset connected with it, which might have existed in favor of Munger, the plaintiff, in the hands of the Rochester bank. The case of *Richards v. Village of Union* (48 Hun. 263), cited by the learned judge in his opinion, was, we think, wrongly decided, because it refused a set-off of the debt due by the insolvent at the time he made the assignment, simply because the debt from the village to the insolvent was not then due. The very fact of the insolvency gave to the party to whom the insolvent owed the debt the right to regard his own debt to the insolvent as due at once and to offset the two debts against each other.

In *Lindsay v. Jackson* (*supra*), the court, while holding that a debt from the insolvent, which was due, might be offset at the request of the debtor to the insolvent on a debt not due, stated that it would be otherwise if the debt were not due from the insolvent and the party were endeavoring to offset such debt against one then immediately due by him to the insolvent.

In this case it is claimed, however, that there is a defense to this offset, upon the ground that the certificate of deposit had not been presented to the plaintiffs' assignors and a demand made for its payment prior to the assignment. To maintain an action strictly upon a certificate of deposit against the person or banking institution signing it, a presentation of the certificate, with a demand for its payment may be nec-

Opinion of the Court, per PECKHAM, J.

essary, for the mere purpose of protection against the claim that the debt was due at the time the contract was made and that the party signing is liable for the payment of principal and interest from that time. The principle is also invoked as an answer to the statute of limitations, where the certificate has been outstanding more than six years. Under such a proceeding as this, where offsets are to be allowed as between these parties upon principles of equity and justice, the fact that no technical demand was made for the payment of this certificate, has no weight. For such a purpose the claim of offset may be regarded as a demand, and it should have relation to the time when the assignment was made, so far as to give form and life to the claim that the debt of the insolvent was due at the time. We agree, in this respect, with the views expressed by the learned presiding judge in *Seymour v. Dunham* (24 Hun, 93), where such a certificate was held valid as a set-off, although there had been no prior demand.

Nor is the allegation that the two Rockwells formed a partnership, and that both were liable as partners upon this certificate of deposit, material in this view. The findings of the referee are that Melvin C. Rockwell had no interest in the profits of the business, nor was he to sustain any of the losses, nor did Martin C. Rockwell sell or transfer to Melvin any interest in the banking business whatever, and the plaintiffs, in their own complaint, allege that the bond and mortgage and the debt secured thereby, belonged to and were the property of Martin Rockwell at the time of making the assignment, and that under and by virtue of said assignment the bond and mortgage passed to and became the property of the plaintiffs, as such assignees. Substantially, therefore, the transaction was one with the individual defendant, Martin C. Rockwell, as the deposit was made in the bank or banking office in which he was really solely interested, and the bond and mortgage were his individual property. Whether Melvin C. Rockwell was, by virtue of his agreement with Martin, a partner as to third persons, and so liable for the debts of the so-called partnership, is not a matter of any importance here.

Statement of case.

It is also claimed that the defendant lost his right of offset because he commenced an action and recovered a judgment against the insolvent subsequent to the assignment for the amount of the debt due him. The reason why an offset is allowed in favor of an individual against the estate of an insolvent, where his debt to the insolvent is not yet due, is, because the party to whom the insolvent owes the debt cannot obtain any satisfaction by proceedings at law, and that unless the offset be allowed, he can obtain no satisfaction in any way. It is the inability to otherwise obtain satisfaction, which is the reason and foundation of the allowance of the offset. Proof of the insolvency of the party owing the debt is sufficient evidence of such inability. But the fact of that inability is rendered no less certain, where, in addition to other proof of insolvency, it is shown that a judgment has been recovered for the debt, and that an execution issued thereon has been returned unsatisfied.

We see no ground upon which the order of the General Term granting a new trial, can rest, and it should, therefore, be reversed, and the judgment entered upon the report of the referee should be affirmed, with costs in all courts to the defendants.

All concur.

Judgment reversed.

119 62
78 AD 614

FRANCES L. LEDYARD, as Administratrix, etc., Appellant, v.
WILLIAM L. BULL et al., as Executors, etc., Respondents.

Where all the parties interested in an intestate's estate are of full age, and one of them, with the assent of the others, undertakes to administer upon the estate without the issuing of letters of administration, settles all claims against the estate, states an account and distributes the balance so shown to be on hand for distribution, and each of the other parties interested takes his or her share, the settlement is, so far as it goes, binding, and no one of them can thereafter claim, through a formal administration, a new distribution; and this is so, in the absence of any claim of fraud or mistake, although it appears that the party making the distribution credited himself in the account with the amount of an

Statement of case.

indebtedness of the intestate to him, which was not questioned by the others.

It seems, however, where the party making the distribution is legally chargeable with interest on any item of the account, and the same is not included in the account, the settlement and acceptance of their distributive share does not, in the absence of a release, bar the other next of kin from claiming and recovering a proportionate share of the interest.

It seems, while as a general rule an administrator may not retain from money in his hands the amount of a debt due him from the intestate, until it has been legally established and allowed, he may do so if all the persons interested in the estate assent thereto.

It appeared, in such a case, that the item upon which interest was claimed, was an item in a running account representing the intestate's share in a business not then closed; that the amount was not definitely determined at the time of the entry, but was entered subject to modification upon a subsequent collection of the assets and closing up of the business; and that the decedent's share was left in the hands of his son, the party who made the distribution, as a deposit, he drawing upon it from time to time during his life as he required money. *Held*, that the item did not draw interest until demand, and in the absence of proof of a demand, interest was not chargeable; also that, conceding the rule to be otherwise, the facts justified an inference that it was the understanding of the parties that no interest should be charged.

In the absence of creditors, an administrator is a mere trustee for the next of kin, charged with the sole duty to collect, convert and distribute the estate.

Where, therefore, the whole estate has been legally and justly distributed, there is no trust duty to be performed and no need of a trustee.

(Argued December 13, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 23, 1888, which affirmed a judgment in favor of defendants entered upon the report of a referee.

This was an action for an accounting.

Asa Worthington, plaintiff's intestate, died November 25, 1875, leaving four daughters and a son, his only children and next of kin. The plaintiff, one of the daughters, was appointed administratrix December 19, 1884. Henry R. Worthington, the son, died December 17, 1880, leaving a will in which the defendants were named as executors.

Statement of case.

The cause of action stated in the complaint is that Asa Worthington and his son, Henry R. Worthington, were associated in business as copartners under the name of Henry R. Worthington & Co.; that on December 31, 1860, Asa Worthington being about to retire, an account of the assets and liabilities were taken and a balance struck, on which there was found "due and owing" to Asa Worthington from the partnership assets \$75,000, which sum Henry R. Worthington agreed to pay, and Asa Worthington agreed to accept as his share of the capital and profits in the business up to the date of the alleged settlement. The complaint further states that on December 31, 1860, there appeared upon the books of H. R. Worthington & Co., to the credit of Asa Worthington, the sum of \$41,539.38, transferred from the account of one Anthony Worthington, against which Asa Worthington had drawn \$39,119.17, leaving a balance on the books to the credit of Asa Worthington on December 31, 1860, of \$2,420.20, which sum Henry R. Worthington also agreed to pay; that the sums were not then paid to Asa Worthington, but were by him loaned to Henry R. Worthington, who used the same in his business. The complaint further states for a separate cause of action, that at various times between 1862 and 1876 Henry R. Worthington received from various sources to the use of Asa Worthington \$4,806.04, which sum Henry R. Worthington retained and used in his business. The defendants in their answer denied all the material allegations of the complaint, and set up as a defense to each cause of action the statute of limitations.

The action was referred, and upon the trial before the referee it appeared that prior to 1860 Asa Worthington and his son had some connection in business, and had had for many years; that on the 24th day of June, 1861, the father wrote a letter addressed to his son, from which the following is an extract:

"Being about to give up my agency in your affairs and retire from active business; and having at the close of the 1860 carefully adjusted the acc'ts in Ledger E, I desire in order

Statement of case.

to a right understanding of them by those who come after me to make the following explanations :

“These acc’ts principally relate to the business you are now engaged in. They commenced in my private or individual books and have so continued to the present time. They therefore appear (so far as you are concerned) as kept by an agent who is to account to you for all receipts on your acc’t after deducting all the expenditures & advances made or paid by him, & this is the manner in which they have been yearly stated to you & your former partner Wm. H. Becker:

“I will state these acc’ts in two ways.

“First—as they will appear if rendered by myself as an agent for you & Secondly—as they will stand if the books in which they are kept, be (as they now will be) considered as your own.”

The writer then states the accounts in the two ways, and shows that, whether he should be regarded as agent or as interested in the business to the extent of one-third, he ought to have for his services \$75,000. This result he reached by stating an account of all the assets and business which he and his son had carried on. Some of the assets were not converted, and accounts to a large amount were outstanding and to be collected.

The letter then continues as follows :

“You have agreed to allow me for my services or agency up to 31st Dec’r 1860 & thence forward while I am able or willing to assist you, the sum of \$75,000, being for services &c. since the year 1845, say 15 years. This sum I have carried to my credit in the Ledger & to the debit of H. R. W. & Co., or your profit & loss acc’t. * * *

“This deducted leaves a balance of \$75,000, the amount you have agreed to allow me for services rendered. This sum of \$75,000, is all I have asked or felt entitled to demand, and you have freely and unhesitatingly allowed it.

“It is now, however, involved in the assets of your business and I do not consider that it is at present due and payable to me.

Statement of case.

“Our fortunes and business have been linked together up to the present time without any agreement or understanding between us of our relative interests. You have been involved by my imprudence in a large outlay of cash funds, resulting in your being compelled to take real estate, heavily incumbered, for your security.

“These incumbrances must be removed and much time consumed before you can realize from it. It would evidently be unjust for me or my heirs to demand payment of my claim before you have had reasonable time to realize from the assets out of which it arises. To your ingenuity and perseverance is mainly due this claim I hold against you and should your assets (now more doubtful than before the existence of our Country's difficulties) prove to be of less value or yield less than was contemplated when the accts were adjusted (31 Dec. 1860) it is but right that a due proportion of such loss or depreciation be deducted from my claim. Altho' our minds have never met until now upon the subject of my compensation, yet I have always supposed that $\frac{1}{3}$ (one-third) of the net profits of the concern would be a fair share for me, and this I shall always be content with (or its equivalent) on a final winding up of the business. I preferred to base my compensation on the principle of a salary rather than this interest in order to avoid the trouble of an adjustment at the termination of my connection with you.

“You have readily yielded to my desire in this respect, and now I think this settlement had best be adhered to. If the assets you hold should prove worthless for instance, I should have no claim upon you, and so, in proportion to their depreciation, I must bear a proportionate rate of the loss, charging me with the same until my share of the net profits, or my compensation rather, be no more than one-third of your net profits. And this adjustment, in case of my absence, I must and do confidently cheerfully leave with you. * * *

“The one-third of this (if this be my interest) is \$75,187.03, so that the sum of \$75,000, now passed to my credit, appears to be near enough to the right one under present appear-

Statement of case.

ances, but time will determine whether these estimates are correct, and I must be debited or credited with the difference as the case may be.

“I do not desire to split hairs with you or to have you go into nice calculations.

“It will be easy enough, by referring to these statements, to determine about the just amo. due me at any time the acct is settled.

“When I am taken away, which must now soon happen, it is my wish and desire, and I here so will and decree that whatever is left to me of worldly goods shall, after paying my just and legal debts, be divided equally between my five children, or to their heirs. * * *

“And I sincerely hope, and it is this belief that cheers me when I contemplate my approaching end, that my children will always continue to feel one common interest in each other's welfare, and that no hard feelings will be entertained or reflections cast to chill my grave that I have not done equal justice to all and loved all with equal affection.

“I am not aware at this time, of owing any one any considerable amount except Maria, so long my faithful housekeeper and your youthful protector and guide. Towards her you know my feelings and obligations. I owe for her unexampled and faithful services for a long series of years. She keeps the acct., altho' I have somewhere a copy of it, but it matters not, whatever she claims she is justly entitled to, and I desire it may be paid to the uttermost farthing, whatever happens and while she lives, let her want for nothing that money, care or kindness can yield. You know her and have experienced her care and kindness. I need say no more. This last request is addressed to all my dear children.”

It further appeared that about March 10, 1876, Henry R. Worthington called his sisters to his office, and there presented and read to them portions of the letter written to him by his father, and either stated or professed to read from the letter that interest on the account had been “waived.” At the same time he presented an account endorsed, “Statement of

Statement of case.

account of Asa Worthington, from books of H. R. Worthington, 1860 to 1875 inclusive." On the credit side of the account was an item of \$75,000, under date of December 31, 1860, and fourteen other items in different years, all the credits aggregating \$121,345.42.

On the debtor side there was a charge under date of January 1, 1860, of \$34,721.84, and charges in each year for money had by Asa Worthington from and including the year 1860 to his death, aggregating \$62,127.80, and the account thus far showed a balance of credit to Asa Worthington of \$24,495.78. The account also contained certain charges against his estate after his death in 1875 and 1876, amounting to \$1,089.50, and after deducting that sum from the first balance there remained a credit balance of \$23,406.28. From this sum he then deducted \$11,000 for rent of the house occupied by his father for eleven years, and the further sum of \$6,465.13 due to Maria Fraser, the housekeeper spoken of in the letter, and there was thus left due from Henry R. Worthington to his father's estate the sum of \$5,941.15.

He subsequently paid the amount due Maria Fraser, and without administration upon his father's estate, paid to his sisters their respective shares in the final balance.

The referee refused to allow the plaintiff any interest upon the credit items in the account, and found that Henry R. Worthington had accounted for and paid the balance due from him to his father's estate to those entitled to the same, and he dismissed the complaint.

Further facts are stated in the opinion.

Isaac U. Miller for appellant. Plaintiff's uncontroverted evidence showed that on December 31, 1860, there was an agreed balance of \$77,420.21 in the hands of Henry R. Worthington belonging to Asa Worthington; for this he was obliged to account. (1 Story's Eq. Juris., § 526; *Lockwood v. Thorne*, 11 N. Y. 70; *Ogden v. Astor*, 4 Sandf. 311; *Lloyd v. Carrier*, 2 Lans. 364; *Wiltzie v. Adamson*, 1 Phil. 357; *Alderson v. Clay*, 1 Starkie, 405; *Mackintosh*

Statement of case.

v. *Marshall*, 11 M. & W. 116; 1 Greenl. on Evidence, § 198; *Prickell v. Hulse*, 7 A. & E. 457; *Champion v. Joslyn*, 44 N. Y. 653; *Lockwood v. Thorne*, 18 id. 286; *Tucker v. Stevens*, 2 Hun. 424; *Ross v. Ross*, 6 id. 80; *Morrow v. Morrow*, 12 id. 386; *William v. Sargeant*, 46 N. Y. 481.) Interest attaches as a matter of law. (*McMahon v. N. Y. & E. R. R. Co.*, 20 N. Y. 463; *Little v. Banks*, 85 id. 267; *Winch v. Ice Co.*, 86 id. 618; *Reese v. Rutherford*, 90 id. 644; *Van Rensselaer v. Jewett*, 2 id. 135; *Dana v. Fiedler*, 12 N. Y. 40; *Martin v. Stilliman*, 53 id. 615; *White v. Miller*, 78 id. 395; *Gilbert v. Van Rensselaer*, 15 id. 399; *Guggenheimer v. Geiszler*, 81 id. 243; *Purdy v. Phillips*, 11 id. 406; *Brennan v. S. L. Ins. Co.*, 4 Daly 296.) The claim is not barred by the statute of limitations. (*Worthington v. Crounditch*, 7 Q. B. 479; *White v. Smith*, 46 N. Y. 418; Abbott's Tr. Brief, 67, § 7; *Murray v. Coster*, 5 Johns. Ch. 522; 20 Johns. 576; Angell on Limitations, §§ 244, 246; *Read v. Hurst*, 7 Wend. 408; *Peck v. N. Y. S. Co.*, 5 Bosw. 226; *Dyer v. Walker*, 54 Me. 18; *Ramsay v. Warner*, 97 Mass. 8; *Shoemaker v. Benedict*, 11 N. Y. 189; Wood on Limitations, 234, 235; *Baildon v. Walton*, 1 Exch. 617; *Davis v. Garr*, 6 N. Y. 124; *Randall v. Wilkins*, 4 Denio, 579; *Benjamin v. DeGroat*, 1 id. 151; Wood on Lim. 254; *Sandford v. Sandford*, 62 N. Y. 555.) The ruling that defendants need account for only about \$6,000 was error. (*Gratton v. Net Life Ins. Co.*, 92 N. Y. 284; *Gildersleeve v. Landon*, 73 id. 609; *Delamater v. Pierce*, 3 Dem. 315; Taller on Exs. 365, 366; 1 Chitty on Gen. Pr. 535; Schouder on Ex. & Ad. 120; *Carter v. Greenwood*, 5 Jones Ex. 410; *Weeks v. Jewett*, 45 N. H. 540; Redfield on Surrogates, 439; Comyn's Digest, 500, 501, 503; *Campbell v. Tousey*, 7 Cow. 64; *In re Flandau*, 28 Hun. 279; *Muir v. Trustees, etc.*, 3 Barb. Ch. 477; *Brown v. Brown*, 1 Barb. 376; *Fay v. Fay*, 9 Cent. Rep. 483; *Scott v. Montells*, 109 N. Y. 1.) Defendants by cross-examination laid the foundation for offering in evidence certain marks in lead pencil claimed to have been made on the account by H. R. Worthington, but

Statement of case.

did not do so. Plaintiff has a right to object to their admission had they been offered. (*Rouse v. Whited*, 25 N. Y. 170; 1 Greenl. on Ev. 263; *Waldele v. R. R. Co.*, 95 N. Y. 274; *Platner v. Platner*, 77 id. 103.) It was plaintiff's duty to collect the estate and the question as to the creditors was not at issue and could not be raised by defendants. *Edwards v. Hoopes*, 2 Wheat. 426; *Patchen v. Wilson*, 4 Hill, 57; *Woodin v. Bagley*, 13 Wend. 153; *Beecher v. Crouse*, 19 id. 306.) The referee erred in refusing the request to find as a matter of fact that there was a waiver of interest. (*Somer v. Meeks*, 25 Nel. 361; *White v. Stillman*, id. 541.)

William Allen Butler and *W. A. Jenner* for respondent. There is no evidence that Henry R. Worthington ever assented to or approved the "Copy-book letter." (*Phelan v. N. Y. Ins. Co.*, 113 N. Y. 147.) Plaintiff having put the account in evidence is bound by all its contents and the oral declarations of Henry R. made at the same time. (*Randle v. Blackburn*, 5 Taunt. 245; *Biglow v. Sanders*, 22 Barb. 147; *Dewey v. Hotchkiss*, 30 N. Y. 497; *Smith v. Jones*, 15 Johns. 229; *Rouse v. Whited*, 25 N. Y. 170; *Platner v. Platner*, 78 id. 103; *Grattan v. Metropolitan*, 92 id. 284; *Wotherspoon v. Metropolitan*, 17 J. & S. 152; 3 How. Pr. 152; *Pendleton v. Weed*, 17 N. Y. 72; *Low v. Payne*, 4 id. 247, 248; *Warrington v. Early*, 2 El. & Bl. 764; *Dewey v. Reed*, 40 Barb. 16.) Where a party wishes to avail of an admission or averment contained in a pleading, he must accept the admission or averment as an entirety; he cannot accept a portion and reject the remainder. (Starkie on Ev. 444; Greenl. on Ev., § 202; *Gildersleeve v. De La Vergne*, 10 Hun, 537; *Albro v. Figuera*, 60 N. Y. 630; *Gildersleeve v. Landon*, 73 id. 609; *Mott v. C. I. Co.*, Id. 543, 550; *Gildersleeve v. Mahoney*, 5 Duer, 383; *Bowen v. Powell*, 1 Lans. 1; *Green v. Givan*, 33 N. Y. 343, 367; *Strong v. Dwight*, 11 Abb. [N. S.] 319; *Fash v. T. A. R. R. Co.*, 1 Daly, 148.) Interest runs only where the amount of a claim is ascertained and liquidated. There must be an express agreement to pay interest or an implied agree-

Opinion of the Court, per EARL, J.

ment from custom or the special circumstances of the case. None of these grounds exist here. (*Reed v. R. G. Factory*, 3 Cow. 387; *Parsall v. Fry*, 19 Hun, 595; *Smith v. Viele*, 60 N. Y. 106, 111; *Crosby v. Mason*, 32 Conn. 482; *Lloyd v. Carrier*, 2 Lans. 364; *Beach v. Colles*, 85 N. Y. 511.) This action is not for deceit or fraud, or any tort whatever. It is founded on an alleged express contract made in December, 1860, and the proof fails to show any such contract. There is nothing on which to found a claim for any wrongful act. (*Carr v. Thompson*, 87 N. Y. 160.) That heirs at law and next of kin are competent to make an agreement for distribution, if creditors do not object, and that when executed such an agreement will not be disturbed, is abundantly supported by authority. (*Walworth v. Abel*, 52 Penn. St. 370; *Weaver v. Roth*, 105 id. 408; *Babbitt v. Bowen*, 32 Vt. 437; *Josey v. Rogers*, 13 Ga. 478; 3 Redf. on Wills, [3d ed.] 89; *Moore v. Gordon*, 24 Ia. 158; *Nickerson v. Bowley*, 8 Metc. 424; *Danners v. Dewes*, 3 P. Wms. 40 n.; *Hayward v. Hayward*, 20 Pick. 517; *Kingsbury v. Scovill*, 26 Conn. 349; *Foster v. Fifield*, 20 Pick. 67; *Adams v. Adams*, 10 Metc. 170; *Fretwell v. McLemore*, 52 Ala. 124; *Byrd v. Byrd*, 44 Ga. 258; *Ricks v. Hilliard*, 45 Miss. 359; *Vroom v. Van Horne*, 10 Paige, 549; *Priest v. Watkins*, 2 Hill, 225; *In re Faulkner*, 7 id. 182; *Ingram v. Young*, 3 T. & C. 491; *Allen v. Eighmie*, 9 Hun, 201; *Smith v. Robinson*, 30 id. 602; *Thomas v. N. Y. L. Ins. Co.*, 18 J. & S. 225.) There is no statute forbidding Worthington reserving his one-fifth. (2 R. S. [6th ed.] 81, § 60; Id. 4449, § 17; 3 id. 88, 733.)

EARL, J. After the death of his father, Henry R. Worthington undertook, with the assent of his sisters, the only next of kin, to administer upon his estate. He stated an account and distributed the balance, and each of his sisters took and had her share. Although all this was done without letters of administration upon his father's estate, so far as it went, it was binding upon the next of kin. They were the persons beneficially interested in the estate, and they could not take their

Opinion of the Court, per EARL, J.

respective shares in the estate and then through administration claim and obtain a new distribution and thus duplicate their shares. (3 Redf. on Wills [3d ed.] 89; *Josey v. Rogers*, 13 Ga. 478; *Byrd v. Byrd*, 44 id. 258; *Babbitt v. Bowen*, 32 Vt. 437; *Walworth v. Abel*, 52 Penn. St. 370; *Weaver v. Roth*, 105 id. 408; *Fretwell v. McLemore*, 52 Ala. 124; *Ricks v. Hilliard*, 45 Miss. 359.) In the absence of creditors, an administrator is a mere trustee for the next of kin, charged with the sole duty to collect, convert and distribute the estate among the beneficiaries according to their respective interests. But where the whole trust estate has already been legally and justly distributed, and the purposes of the law thus accomplished, there is no trust duty to be performed and no need of a trustee.

There is no dispute that Henry R. Worthington, discharged a valid debt of his father by the payment he made to or on account of Maria Fraser, his father's housekeeper, and the propriety of that payment is in no way challenged; nor is there any dispute that he made proper distribution among the next of kin of the final balance due from him of about \$6,000. At the time of the settlement with his sisters he claimed \$11,000, due him from his father for rent, and they assented to it. While an administrator cannot retain from money in his hands the amount of a debt due him from his intestate until it has been legally established and allowed, yet he may do it if all the persons interested in the estate assent thereto. In that event he need not make formal proof of his claim, but the assent takes the place and answers the purposes of proof. Here the sole parties interested in the estate undertook to settle up and divide the estate without administration, and this claim was made, assented to and deducted and the balance distributed. The children of the intestate must have known whether he occupied a house of his son under such circumstances as to make a claim for rent just and proper; and for ten years after the settlement, and for four years after the death of the son, it does not appear that any one raised any question about the propriety of the claim or its allowance. It was,

Opinion of the Court, per EARL, J.

however, open to the plaintiff upon the trial of this action to show that there was some fraud or mistake as to this claim. But she gave no evidence whatever impeaching it, and the settlement and distribution then made must, therefore, stand and bar this action unless interest upon some one or more of the credit items of the account was due from the son to the estate of his father. The main contention at the trial and since has been over the interest, and unless the plaintiff is entitled to recover some interest the judgment below is right and must be affirmed.

The referee held that the statute of limitations did not furnish any defense and, therefore, we need not give that defense any consideration, nor determine whether or not the referee's decision in reference thereto was right.

If Henry R. Worthington was legally bound to pay interest, we do not think that the settlement made in March, 1876, bars the plaintiff from its recovery. If he owed the interest, he has never paid it, and the next of kin never released him from its payment, and his estate, assuming that the claim is not barred by the lapse of time, is still bound to pay it.

We then come to the important question, was Henry R. Worthington legally liable to pay interest on any of the items on the credit side of the account found in his books and rendered by him to his sisters?

As to the interest, we have no material evidence outside of the letter addressed by the father to his son, and the account rendered from his books by the son. The evidence as to the precise relations between them is very meager, and we have no evidence whatever of their dealings, relations or transactions with each other from 1860 to the death of the father in 1875, a period of fifteen years, except what is furnished by the account; and all that shows is the credit items upon one side of the account, and debit items upon the other side for moneys had by the father.

We must assume that the son received the letter written by his father at about its date. He produced it after his father's death, and acted upon it. The credit of the \$75,000 was

Opinion of the Court, per EARL, J.

entered in the books of his business and he must have been cognizant of the entries in those books. Those entries are intelligible only by a reference to the letter. He made no claim that it had then recently come into his possession or that he had not assented to the statements therein made. The declarations therein contained are at least binding upon the plaintiff as the representative of the writer.

We will confine our attention to the \$75,000, because if that item did not draw interest it would be easy to show that none of the others did. That was a sum agreed upon for the value of the father's services for many years, or for his share of the profits of the business carried on by him and his son.

Interest is payable for the loan or retention of money by express contract, or as damages for non-payment of money due. Here there was no contract to pay interest; and hence, no interest could be claimed upon the \$75,000, unless that amount became due and payable, and the son was in some way in default for not paying. The general rule is, that in the absence of an agreement to pay interest, it is implied by law as damages for not discharging a debt when it ought to be paid. The important practical inquiry, therefore, in each case in which interest is in question is, what is the date at which this legal duty to pay as an absolute present duty arose? In the case of a running account it is not sufficient that the account is capable of accurate statement or of liquidation from the facts which it contains, or that its payment may be presently enforced. Interest is refused upon such accounts more upon the ground that there is a running credit, than because the demand is uncertain and actually unliquidated. (1 Sutherland on Damages, 582, 596, 615.) Money payable on demand does not draw interest until after demand, and so, money deposited with a depository, does not draw interest until after demand. These general rules of law might be more fully stated, but they are sufficient for the present purposes.

Now what are the facts to which these rules of law must be applied? The father did not take from his son any obligation

Opinion of the Court, per EARL, J.

for the payment of the \$75,000, and there is no hint in the letter that he expected any interest thereon. He simply entered it as a credit in the books of his son's business. There he left it for nearly fifteen years without exacting any interest and without giving himself credit or asking that he should have credit in the account for interest. Other credits were given him in the same account, and he was annually charged therein with moneys had by him. If there had been any understanding that he was to have interest, would there not have been some mention of a matter of such importance, or would not the interest have been credited against the moneys had? If there had been between father and son a simple adjustment of the claims of the father at the sum of \$75,000, and nothing more, that amount would have been presently due and would have drawn interest. But here the father entered this sum as an item of account, giving his son credit therefor in his books, thus leaving it fairly to be inferred that it was not presently to be paid, and that the son must have some forbearance at least. But this is not all. The sum of \$75,000 was not definitely fixed as the sum absolutely to be paid by the son. It was merely tentative. It was based upon statements which might or might not prove accurate. In the letter he said: "The sum of \$75,000 now passed to my credit appears to be near enough, but time will determine whether these estimates are correct, and I must be debited or credited with the difference, as the case may be. * * *

It will be easy enough, by referring to these statements, to determine *about* the just amount due me at any time the account is settled." It thus appears that a further settlement or adjustment at some indefinite future time was contemplated. The son did not have the \$75,000 in money or in assets readily convertible into money, and hence the father said that he did not consider that it was "at present due and payable" to him. He stated that the son had been involved by his imprudence and compelled to take real estate heavily incumbered for his security; that it would take much time before the son could realize from the real estate and that it would be evidently

Opinion of the Court, per EARL, J.

unjust for him or his heirs to demand payment of his claim until his son had had a reasonable time to realize from the assets out of which it arose. If the son's assets did not turn out as estimated, there was to be a corresponding deduction from the sum of \$75,000, and the final adjustment in case of his decease, he said: "I must and do confidently cheerfully leave with you."

In the face of these statements and others contained in the letter, how can it be said that any sum was absolutely established as payable to the father? Clearly the \$75,000 was not presently payable. The son was not at once in default for not paying it. The father could not have sued him for it without a demand, and could not have recovered it without some proof that it had become payable according to the terms of the settlement as contained in the letter. How much was a reasonable time to realize upon the son's assets? There is no proof showing this, and it may have taken many years. If the \$75,000 never became absolutely payable in the life-time of the father, when did it become payable? In the absence of any proof whatever — in the absence of any demand, how is it possible to fix any definite time from which interest would have to be computed? The father evidently treated his son as the depositary of the money due him, and he drew upon his deposit from time to time as he needed money for the support of himself and family, and in this view the sum could not draw interest until demanded. There was, we think, absolutely no basis for the allowance of interest. But if we are wrong in this, yet, we think, upon the facts, the referee could justly draw the inference that it was the understanding of the parties that the sum should not draw interest.

It may be said with much force that it is improbable that the father supposed that he was living upon and using up his principal when the interest would have been ample to support him. Evidence as to the relations and transactions between the father and son during the fifteen years after the settlement might clear up the mystery. But, at the time the letter was written, it is evident that the father did not expect

Statement of case.

to live long, and for some reason not explained by the meagre evidence nothing was done to set the interest running.

We do not feel certain that in the denial of all interest absolute justice is done to the next of kin. But this action was not commenced until more than twenty-four years after the settlement, nearly ten years after the death of Asa, and nearly five years after the death of Henry R. Worthington, and the great lapse of time has probably rendered it difficult, if not impossible, to furnish a legal basis by evidence, if it ever existed, for the allowance of interest.

Our conclusion, therefore, is that the judgment should be affirmed with costs.

All concur, except RUGER, Ch. J., and PECKHAM, J. dissenting.

Judgment affirmed. _____

In the Matter of the Judicial Settlement of the Accounts of
GEORGE W. CHAUNCEY, Trustee, etc.

The will of K. gave her residuary estate to her executors in trust, to receive rents, profits and income, and after paying therefrom certain specific annuities, among them one of \$500 to D., her adopted son, for his support during minority, and \$1,000 thereafter during the life of her husband, to apply the balance to the use of her husband during his life. After his death to pay to D. \$2,000 per annum during his life. D. survived the husband, and for a number of years after the death of the latter the annual income was insufficient to pay the said annuity in full. Subsequently it exceeded that amount. Upon a settlement of the accounts of the trustee, *held*, that, in the absence of any language in the will showing a different intent, D. was entitled to have the surplus applied in the first instance to the satisfaction of deficiencies in the annuity for the years it was not paid in full.

Casamajor v. Pearson (8 Cl. & Fin. 100), distinguished.

It seems, if on any year, after full payment of deficiencies for the years preceding, there remained a surplus of income, as it was undisposed of by the will, it would have been competent for the trustees to have paid it over for distribution among the next of kin.

Baker v. Baker (6 H. L. Cas. 616), distinguished.

In re Chauncey (53 Hun, 134) reversed.

(Argued December 18, 1889; decided January 14, 1890.)

Opinion of the Court, per RUGER, Ch. J.

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made June 28, 1889, which reversed in part a judgment in the above entitled proceeding entered upon a decision of the court on trial at Special Term.

This was a proceeding for the judicial settlement of the accounts of George W. Chauncey, as trustee under the last will and testament of Mary L. Kirby, deceased.

The material facts are set forth in the opinion.

Jesse Johnson for appellant. The clear, literal construction of the will gave Delaney a fixed and certain legacy. (*Stewart v. Chambers*, 2 Sandf. Ch. 382; *Cochrane v. Walker*, 4 Dem. 164; *Booth v. Coulton*, L. R. [5 Ch. App.] 684; *Pitt v. Lord Dacre*, L. R. [3 Ch. Div.] 295.

William C. Holbrook for respondent. The gift to Delaney is not independent of that to William L. Kirby, the husband of the testatrix, but is grafted upon, or excepted out of it, and is, in a sense, secondary to it, in that it was the primary intent of the testatrix to provide for her husband. (*Delaney v. Van Aulen*, 84 N. Y. 16; *Perry on Trusts*, § 920; *Walker v. Beal*, 106 Mass. 109; *Story's Eq. Juris.* [13th ed.] § 1208; *Redfield on Surrogates*, 447; *Williams on Executors*, 1475; *Wager v. Wager*, 89 N. Y. 161-166.) There is nothing in the will which plainly indicates that the testatrix intended that any of the annuities given to Delaney should be payable "in any event," or that he should be entitled to have deficiencies in any one or more years made up from any surplus thereafter arising. (*Baker v. Baker*, 6 H. L. Cas. 628, 686; *Casamajor v. Pearson*, 8 C. & F. 69; *Darbon v. Rickards*, 14 Sim. 537; *Tarbottom v. Earle*, 11 Wkly. Rep. 680; *Estate of Pierce*, 56 Wis. 560.

RUGER, Ch. J. The question in this case regards the disposition of the surplus income arising in certain years from a trust fund created for the purpose of paying annuities. It is claimed by the annuitant that such surplus is applicable, in the first

Opinion of the Court, per RUGER, Ch. J.

instance, to the satisfaction of deficiencies in the annuity occurring in previous years from the insufficiency of annual income to pay them in full; and by the next of kin, that it goes to them as property remaining undisposed of by the will.

The portion of the will under which the question arises reads as follows:

Third. I give, devise and bequeath unto my executors hereinafter named, and to the survivor of them, all the rest, residue and remainder of the estate, real and personal, of which I may die seized and possessed, in trust, nevertheless, to and for the uses and purposes following, that is to say: To receive the rents and profits of such part thereof as shall consist of real estate, and to invest and keep invested upon bond and mortgage of real estate, or in the public funds of the United States, state or city of New York, as they may deem most safe and productive, such part thereof as shall consist of personal estate, and apply said rents and profits of real estate and interest or income of personal estate to the use of my said husband, William L. Kirby, during his natural life, except that they shall apply to the use of James E. Delaney, who was brought up by me, the sum of five hundred dollars per annum thereout, until he shall arrive at the age of twenty-one years, and from and after that time the sum of one thousand dollars per annum therecut, during the life-time of my said husband, William L. Kirby, and from and after the decease of my said husband, the sum of two thousand dollars per annum thereout, during his natural life.

With the exception of a trivial legacy of wearing apparel and silver plate to a relative, the above contains the sole disposition of property made by the will, and the testatrix, therefore, died intestate as to the corpus of her estate, and as to so much of the income thereof as should not be needed for the satisfaction of the annuities charged thereon. So long as William L. Kirby lived no question could arise over the disposition of the surplus, as he was entitled to the whole income after payment of the annuity to Delaney. Delaney arrived

Opinion of the Court, per RUGER, Ch. J.

at his majority before the death of the testatrix, and no payments accrued to him under the five hundred dollar provision.

William L. Kirby survived his wife only two years, and during that period Delaney received substantially the amount of his annuity, and the question in the case arises, therefore, over the payment of annuities after that period under the two thousand dollar provision.

For a number of years after the death of William L. Kirby, the annual income from the fund was insufficient to pay the annuity in full to Delaney; but in the course of time it so increased that it exceeded the amount of the annuity, and the disposition of this surplus is the subject of the present controversy. Should it be first applied to the satisfaction of the deficiencies of previous years, or does it go to the next of kin as property undisposed of by the will? No such question could, of course, arise under a provision which gave the annual income, or an income not exceeding a certain amount, to one or more legatees from a certain fund; but it is contended that under the circumstances of this case where a fixed sum is given as an annuity *for support* and there is no language in the will showing a different intent, the legatee is entitled to have his annuity made up to its full sum by the accumulations of subsequent years.

Upon a previous appeal to this court upon questions arising under this will (84 N. Y. 16), it was held that the legacy to Delaney was not a demonstrative legacy and was, therefore, not payable from the corpus of the fund in case of a deficiency of income to satisfy the full sum of the annuity. This was obviously correct, since the will plainly provided that the annuity was payable from income alone, and the intention of the testatrix could not be violated by applying the fund itself to the payment of charges which had been otherwise imposed. This decision, however, does not affect the determination of this controversy. That is to be solved by an examination of the will and such information as to the intention of the testatrix as may be gleaned from a consideration of both its positive and negative provisions as well as of its omissions.

Opinion of the Court, per RUGER, Ch. J.

We do not think much light can be derived, from the particular form observed by the testatrix in creating the trust, as it was inartificially drawn and must be construed according to its legal effect. In terms she creates a trust in the residue of her estate for the benefit of her husband, but excepts from his bequest the payment of certain annuities to Delaney. In legal effect the trust was intended, first, to provide for the payment to Delaney of the annuity given to him, and the balance of the income alone was payable to the husband.

The trust was, therefore, to pay from the income of her estate to Delaney five hundred dollars per annum during his minority ; one thousand dollars a year thereafter during the life of William L. Kirby and two thousand dollars a year after his death ; and during William L. Kirby's, life to pay to him the balance of the income beyond what was necessary to satisfy Delaney's claim. These sums were not by the will in express terms made payable from the annual income, but constituted a charge upon the aggregate income of the estate. It is obvious that the legacy to Delaney was distinguishable from the provision for the benefit of the husband, for in the one case the husband was to have the gross income less the charge upon it, whatever it might be, and subject to all casualties that might affect it and he could in no event have more than this sum ; Delaney was, however, to have a fixed sum which could not be increased beyond the allotted amount. These sums were evidently graduated for his support as they varied according to his probable requirements, and were increased as advancing years might add to his wants and necessities. It was not intended as an exception from the gift to the husband, to be governed by the characteristics and conditions applying to that gift, for it was in terms to continue after his death and to exist as a continuing and independent trust for Delaney's benefit so long as he should live. It was, in the natural course of events, contemplated that Delaney should survive the husband and that his annuity should outlive that to Kirby. The intent clearly implied that it was given for support, implies also an intention that it should be payable periodically

Opinion of the Court, per RUGER, Ch. J.

and absolutely to meet the requirements of daily necessities. This intention might be temporarily defeated by the casualties affecting all financial transactions; but so long as the property remained and yielded an income, it was the manifest intention of the testatrix to give it, to the extent indicated, to the child she had reared and made the object of her love and protection. Aside from her husband, she mentioned no other object of bounty in her will except Delaney, and no intention can be derived therefrom that she intended to die intestate as to any part of the income of her estate, while the specific provisions thereof remained unsatisfied. In making these provisions she was not weighing out the payment of a debt or the satisfaction of legal obligations, but was providing for the necessities of one whom she supposed had a moral claim upon her bounty and protection. She was endeavoring to preserve the object of her regard from future want and dependence. She could have had no intention of depriving him of the amount deemed necessary by her for his support for the benefit of strangers, in case the casualties of one year impaired the income of the fund which might, by the prosperity of another year, be rendered sufficient to meet all of the obligations which she had charged upon it. The trust was created for the sole purpose of paying the income thereof, during the lifetime of her husband, to him and her adopted child, and it cannot be supposed that she intended to scrimp them, in the interest of persons whom she did not regard of sufficient consideration to be even referred to in her will. She must, in the natural course of events, have contemplated that accident, mismanagement, or misfortune might, for one or more years, through the influence of events which could not have been foreseen or guarded against, render it impossible to pay promptly the charges fixed upon the income of the trust, and it is inconsistent with the design of a provision for support, to suppose that she intended in such event that the object of her care and affection should be left without income for the benefit of persons whom she did not know. It is impossible for the wisest and most prudent manager to place pecuniary invest-

Opinion of the Court, per RUGER, Ch. J.

ments entirely beyond the reach of financial hazard and risks, but by placing the corpus of her estate in trust she doubtless hoped to preserve a principal which should at least, in the course of years, realize the sums she had charged upon it, and we can find no intent in the will that such income should be payable to strangers, so long as the fixed charges made by her should remain unsatisfied.

The contention of the next of kin would lead to the establishment by the trustees of a financial year which should be inflexible, and whenever the year terminated should require them to close the books and begin a new and independent term for the receipt of income. In such event the lapse of a year without the receipt of income would cause the loss of the annuity to the devisee, no matter how productive the fund might prove for succeeding years. This result must be worked out by reference to the intention of the testatrix, if sustainable at all, but we have heard no reasons drawn from the provisions of the will which support such a theory.

It is claimed, by the next of kin, that the case of *Casamaijor v. Pearson* (8 Clark & Fin. 100), is an authority for their contention. We do not so read that case. The facts are somewhat complicated and voluminous, but they may be summarized so as to show the principle governing the decision. The testator gave his whole estate to trustees, and, among other purposes, to invest a sufficient sum to pay two annuities of £400 each to F. and P. during their respective lives, if the fund should prove sufficient to pay them in full, and if not, to divide it proportionately between them, but if the fund proved more than sufficient — to vest the surplus and divide it with the capital sum set apart for the annuities, as the same should become tangible by the death of each annuitant among residuary legatees. In this case the intention of the testator was clearly manifested, as there was an express provision that in case of insufficiency of income there should be paid to the annuitants only so much thereof as was annually realized from the fund invested, and all surplus accumulations as well as the corpus of the estate was given expressly to residuary legatees.

Opinion of the Court, per RUGER, Ch. J.

We do not doubt the case was well decided, and in accordance with the expressed intention of the testator. The question here involved is not new in this state, and has, as we read the authorities, been expressly decided in favor of the annuitants. (*Stewart v. Chambers*, 2 Sandf. Ch. 382.) In that case the testator, having a wife and two small children, and also four adult children by a former wife, after giving legacies to the latter, directed his executors to convert all the residue of his estate and invest it in stock or on real security, so to remain until the death or marriage of his wife and until the youngest child became of age. Out of the interest and income they were to pay to his wife an annuity so long as she remained sole, and to his two infant children each an annual sum in half yearly payments, varying according to their age from time to time. Each was to have £1,000 on her marriage, and when the youngest became of age and the widow's annuity ceased, the residue was to be divided equally between them. The will further provided in the meantime that all the surplus interest and income, after paying the annuities, should be divided among the four adult children semi-annually. The income of the residue of the estate was insufficient to pay the three annuities during ten years that the widow survived. After her death it was more than sufficient to pay the two infants' annuities. It was held that the surplus then arising must be applied to the discharge of the three annuities which accrued prior to the widow's death, before any of it could be divided among the adult children. This conclusion was reached in analogy to the principle that legacies for the support and maintenance of a wife and children do not abate with the general legacies. It was further held that the direction for half yearly payments of annuities and distribution was a regulation under the general intent of the will, as to the time of payment of the annuities and for a division after they were fully paid, and that testator's intent would be violated by a division of the surplus of any half year, leaving any portion of the annuities unpaid which fell due previously. We entirely agree with the conclusions reached by the learned

Opinion of the Court, per RUGER, Ch. J.

assistant vice-chancellor in that case and consider them in point here. This case differs from that only in the fact that no specific disposition of the surplus is made by the will, which leaves it free from the difficulty suggested, of an ulterior disposition of the fund in question. We are of the opinion that in case there had been a surplus of income in any year after full payment of preceding annuities, it would have been competent for the trustees to have paid it over for distribution among the next of kin, as a fund would thereby have been created which was not disposed of by the will; but that no such distribution could properly be made while any part of such annuities remained unpaid.

The case of *Stewart v. Chambers* was followed by the learned surrogate of New York in *Cochrane v. Walker* (4 Dem. 164). The views expressed are also fully sustained by recent English authorities. *Booth v. Coulton* (L. R. 5 Ch. App. 684) and *Pitt v. Lord Dacre* (L. R. 3 Ch. Div. 295) may be referred to as supporting the doctrine contended for. The case of *Baker v. Baker* (6 H. of L. Cas. 616) is not in point. The question in that case was whether the annuity was a demonstrative legacy payable out of the corpus of the fund, and it was held that it was not, and in that respect agrees with the view of this court upon the construction of the will under consideration. (*Delancy v. Van Aulen*, 84 N. Y. 16.)

In accordance with these views, the order of the General Term should be reversed and the judgment of the Special Term affirmed with costs of the appeal in this court and the Supreme Court.

All concur.

Judgment reversed.

Statement of case.

JOHN PHELAN, Appellant, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

H., plaintiff's assignor, entered into a contract with defendant for regulating and grading one of its streets. By the contract, plaintiff agreed to complete the work in 320 days after its commencement, and in case of failure so to do, to pay inspectors' wages for excess of time employed. It was stipulated that in computing the time "the total time during which the work of completing the contract is delayed in consequence of any act or omission" of defendant, which, it was stated, should be determined and certified to by the commissioner of public works, should be excluded. The work was not completed in the 320 days and defendant retained the inspectors' fees for the extra time. In an action to recover, among other things, the amount so retained, plaintiff claimed that the work was delayed because of obstructions left by defendant on the street, and that it was completed within 320 days after their removal. *Held*, that by the terms of the contract it was a condition precedent to any right of the contractor to be relieved from the allowance of inspectors' fees, to have the matter submitted to and determined by the commissioner, and in the absence of proof that this had been done, or that the commissioner had been called upon but had neglected or refused to act, plaintiff could not recover.

Plaintiff also claimed to recover for damages sustained because of the defendant's delay in removing the obstructions. Upon receiving the final payment, plaintiff executed to the city a release of and from all actions, causes of action, damages, etc., which he had resulting or arising from the contract. *Held*, that the release was a good defense to the claim. Reported below, 22 J. & S. 523.

(Argued December 16, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 7, 1889, which overruled exceptions taken on the trial and ordered judgment for defendant on the verdict.

This action was brought by plaintiff, as assignee of the contractor, to recover a balance alleged to be due upon a contract made by defendant as party of the first part with Nicholas Haughton as party of the second part, for regulating, etc., One Hundred and Twelfth street from Madison avenue to Sixth avenue in the city of New York. Also, as a second

Statement of case.

cause of action, to recover damages sustained by reason of delay in the work alleged to have been caused by the delay of defendant in removing obstructions upon the street which prevented the prosecution of the work. The contract contained this clause :

“Said party of the second part hereby further agrees that he will commence the aforesaid work on such day and at such place or places as said commissioner may designate, and progress therewith so as to complete the same in accordance with this agreement, on or before the expiration of three hundred and twenty days thereafter ; that the said number of days shall not be construed to mean consecutive days, but the aggregate time of all the inspectors who may be employed on the work ; and that in the computation of said time the total time aggregated in days or parts of days during which the work of completing the contract is delayed in consequence of any act or omission of the parties of the first part (all of which shall be determined by the said commissioner of public works, who shall certify to the same in writing), and also Sundays and holidays on which no work is done, and days on which the prosecution of the whole work is suspended by the said commissioner, shall be excluded. * * * And the said party of the second part hereby agrees that the said parties of the first part shall, and they are hereby authorized to deduct and retain out of the moneys which may be due or become due to the said party of the second part under this agreement as damages for the non-completion of the work aforesaid within the time hereinbefore stipulated for its completion, the sum which shall accrue and become due for the inspectors’ wages for each and every day the aggregate time of all the inspectors employed upon said work may exceed the said stipulated time for its completion.”

The defendants alleged and proved that the work was not completed within the three hundred and twenty days, but exceeded that time three hundred and seventy-five days, and in making the final payment the amount of the inspectors’ fees for the extra time was deducted. Upon completion of the

Statement of case.

work and receipt of the final payment plaintiff executed to the city an instrument by which he released and discharged the city in the following terms: "Of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which against them I ever had, now have or which my heirs, executors, administrators or assigns hereafter can, shall or may have, for, upon or by reason of a certain contract or agreement made the 25th day of June, 1881, by and between John Phelan and N. Haughton and the said mayor, aldermen and commonalty of the city of New York, for regulating, etc., One Hundred and Twelfth street, from Madison avenue to Sixth avenue, or by reason of any matter, cause or thing whatsoever resulting or arising therefrom, from the beginning of the world to the day of the date of these presents," excepting, however, any legal claim which the plaintiff may have to the amounts deducted and withheld for excess of inspection.

James A. Deering for appellant. The plaintiff is entitled to the balance of the contract-price. *Jones v. Judd*, 4 N. Y. 412; *McConihe v. N. Y. & E. R. R. Co.*, 20 id. 495; *Moses v. Bierling*, 31 id. 462; *Doyle v. Halpin*, 1 J. & S. 352; *Allaman v. Mayor, etc.*, 43 Barb. 33; *Mansfield v. N. Y. C. & H. R. R. Co.*, 102 N. Y. 205; *Cross v. Baird*, 26 id. 88; *U. S. v. Muller*, 113 U. S. 153; *Weeks v. Little*, 11 Abb. [N. C.] 417.) The contract does not make the decision of the commissioner final and conclusive or binding upon the parties to this action. (*Bigler v. Mayor, etc.*, 9 Hun, 253; *Doyle v. Halpin*, 1 J. & S. 352.) The learned judge erred in directing a verdict for defendants upon the ground that, as plaintiff began the work immediately upon notification from defendants so to do, as required by the contract, such beginning was a waiver of any defense that the street was incumbered, and that he thereby absolved the defendants from any duty they theretofore owed him, under

Opinion of the Court, per ANDREWS, J.

the contract or in law, of removing from the premises any and all obstructions and impediments to the continuance and completion of the work so begun. (*Mansfield v. N. Y. C. & H. R. R. Co.*, 102 N. Y. 205; *Starbird v. Barrows*, 38 id. 231; *Taylor v. Mayor, etc.*, 83 id. 625; *Ruff v. Rinaldo*, 55 id. 664; *Allamon v. Mayor, etc.*, 43 Barb. 38.) The learned judge erred in refusing to submit to the jury the question as to whether or not the delay in the performance of the work was caused by the acts, omissions or neglect of defendant. (*Gallagher v. Nichols*, 60 N. Y. 438; *Moses v. Bierling*, 31 id. 462; *Underwood v. F. J. S. Ins. Co.*, 57 id. 500; *Young v. Hunter*, 6 id. 204.) It was error to dismiss the complaint as to the "Second" cause of action upon the ground that the plaintiff had released it. That release did not affect a claim of this kind. (*Allamon v. Mayor, etc.*, 43 Barb. 39; *Miller v. Coates*, 66 N. Y. 610; *Ryan v. Ward*, 48 id. 204; *Redfield H. P. Co.*, 56 id. 354; *Board v. Guillard*, 60 id. 614.)

D. J. Dean for respondent. The fact that the shanty and the Polo Ground fence encumbered the street, furnishes no ground of action to the plaintiff, and does not excuse the delay, or entitle the plaintiff to recover for the amount charged against him for inspectors' wages. (*B. N. Bank v. Mayor, etc.*, 63 N. Y. 237; *Smith v. Brady*, 17 id. 176; *Butler v. Tucker*, 24 Wend. 447; *U. S. v. Robinson*, 9 Pet. 319; *Nolan v. Whitney*, 88 N. Y. 648.)

ANDREWS, J. The release was a good answer to the second cause of action alleged in the complaint, founded on the delay on the part of the city to remove the obstructions in the street, thereby preventing the plaintiff from proceeding with the performance of the contract. (*Seymour v. Minturn*, 17 John. 170; *Gray v. Barton*, 55 N. Y. 68; *Coulter v. Board of Education*, 63 id. 366; *Simson v. Brown*, 68 id. 355.)

The claim to recover the sum retained by the city for inspectors' fees for the 375 days beyond the 320 days allowed by the contract for the completion of the work, is based on the ground that performance was prevented by the neglect of the

Opinion of the Court, per ANDREWS, J.

eity to remove the obstructions from the street. The plaintiff requested the court to submit the question to the jury, which request was refused, and the plaintiff excepted. There was no error in this ruling. The contract provides that in computing the time exceeding the 320 days, the time "during which the work of completing the contract is delayed in consequence of any act or omission of the party of the first part (all of which shall be determined by the commissioner of public works, who shall certify the same in writing), and also Sundays and holidays on which no work is done, and days on which the prosecution of the work is suspended by the said commissioner, shall be excluded." There was no determination by the commissioner of public works applied for or made under this provision. The inspectors' fees were a proper charge under another provision of the contract, unless, according, to the provision quoted, the delay was occasioned by the act or omission of the city. But by the terms of this clause it was a condition precedent to any right of the plaintiff, to be relieved from the allowance of inspectors' fees, that the matter should have been submitted to, and determined by the commissioner of public works, and this was not done. It was a lawful provision, and is an answer to the claim in the first count of the complaint. If the commissioner had neglected or refused to act when called upon to do so, a different question would be presented. (*Smith v. Brady*, 17 N. Y. 176; *Bowery National Bank v. Mayor, etc.*, 63 id. 336; *Nolan v. Whitney*, 88 id. 648.)

The point that it was not proved that the inspector, Fitzgerald, who was paid for 304 days' inspection, had ever performed the work of inspection, is not presented by the case, as the deposition of Fitzgerald, which was read on the trial, is not printed, and this evidence may have supplied the proof which is now absent.

We find no error in the judgment, and it should, therefore, be affirmed.

All concur.

Judgment affirmed.

Statement of case.

THE CHURCH OF ST. MONICA, Respondent, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK *et al.*, Appellants.

In an action to have certain taxes imposed upon real estate in the city of New York in and for the year 1882, adjudged void and cancelled, and to restrain their collection, the following facts appeared: The premises were purchased by one D., and were conveyed to him individually prior to the assessment and imposition of the tax; he purchased, however, for and with the moneys of plaintiff, a Roman Catholic church, of which he was pastor. It was common for priests of the church to have church property conveyed to them in this way. Prior to said conveyance, and ever since, said premises were and have been used exclusively for school purposes, under the management of D., as pastor — all branches of common school education being taught. Plaintiff was not incorporated as a religious body until in 1885, when D. conveyed the premises to it. The school has never been incorporated. A judgment was rendered in favor of plaintiff. *Held*, error; that said premises were not “a school-house” within the meaning, and were not exempt under the provisions, of the Revised Statutes (1 R. S., 388, § 4); that plaintiff being, when the tax was imposed, unincorporated, was not a “religious society” within the meaning of the acts (chap. 282, Laws of 1852, and § 827, chap. 410, Laws of 1882) with reference to exemptions from taxations in the city of New York, which declare that the exemption of a school-house or other seminary of learning shall not apply unless the building is “exclusively the property of a religious society;” that the words refer to a society that has been incorporated.

(Argued December 16, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York entered upon an order made February 7, 1889, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought for the purpose of having certain taxes which were imposed upon real estate in the city of New York in and for the year 1882, adjudged void and cancelled and to restrain the collection thereof.

The case was tried at a Special Term of the New York Superior Court, and the trial justice found the following

Statement of case.

facts: That on or about December 22, 1881, James S. Dougherty entered into a written contract with the New York Life Insurance Company for the purchase of premises known as No. 304 East Seventy-Eighth street, New York city, upon which was a four story building, with basement; that on or about January 17, 1882, for a valuable consideration, the insurance company, by deed, conveyed the premises to Dougherty, who took the property in his own name individually, but purchased the same on behalf and with moneys belonging to the church of St. Monica, a religious society of the Roman Catholic Church, of which he then was pastor; that it is a common custom for priests of the Roman Catholic Church to take deeds of property in their own names, and this custom was known to the archbishop at the time of the purchase, and the purchase was made with the archbishop's knowledge and authority; that prior to January, 1882, and ever since the building was and has been used exclusively for school purposes under the management of Dougherty as pastor of the church of St. Monica; that the school was presided over by the Sisters of Charity; that all female children of St. Monica's parish, between the ages of five and sixteen years, were admitted to the school, which was known as St. Monica's Female Parochial School, and that all branches of common school education were taught there; that the basement and several floors of the building during the period aforesaid were used as follows: The basement was the classroom for primary children; the first floor, the class-room for large children; the second floor was used for the chapel; the third floor for a lecture room, and the fourth floor for the residences of the Sisters of Charity (with the exception of three rooms used for storage); that the city of New York, through its proper officers, assessed the premises for taxation in and for the year 1882 in the sum of \$7,000, and thereafter imposed a tax upon the premises for that year, based upon the assessed valuation, amounting to \$157.50; that in the year 1885 the church of St. Monica was incorporated as a religious body under the provisions of chapter 45, Laws of 1863, and amendments;

Statement of case.

that on or about May 28, 1885, Dougherty conveyed the premises to the plaintiff, the incorporated church of St. Monica; that the parochial school is not incorporated, but belongs to the plaintiff, and he found as conclusions of law that the tax of \$157.50 imposed upon the property for 1882 was void, because at the time of the imposition thereof the property was exempt from taxation for the reason that the building was a "school-house," within the meaning of the statute exempting school-houses from taxation, and was exclusively used for the purposes of a school, and was exclusively the property of a religious society; and he gave judgment for the plaintiff as prayed for.

D. J. Dean for appellant. The building in suit was not a "school-house" within the meaning of the statute. (R. S. chap. 13, tit. 1, § 4; Laws of 1852, chap. 282; Laws of 1882, chap. 410, § 827; *Chegaray v. Mayor, etc.*, 13 N. Y. 220, 229; *Ass'n. v. Mayor, etc.*, 104 id. 581, 584; *People ex rel. Bd. of Assess.*, 32 Hun, 457; 97 N. Y. 648; *People v. Bd. of Education*, 13 Barb. 410, 411; 38 Hun, 595-596.) At the time of assessment for taxation in 1882, the building was not exclusively the property of a religious society. (*St. Francis v. Mayor, etc.*, 51 Hun, 355; 112 N. Y. 677; *Tracy v. Reed*, 38 Fed. Rep. 69; R. S. [7th ed.], 2181, §§ 51, 52, 53; 98 N. Y. 488; Laws of 1882, chap. 410, § 818; Laws of 1867, chap. 410, § 5.) The building and premises were not used exclusively for the purpose of a school-house. (*Reed v. Johnson*, 53 Tex. 284.)

Alexander B. Johnson for respondent. The building known as St. Monica's Female Parochial School was a "school-house" within the meaning of the statutes. (R. S. chap. 13, § 4; Laws of 1823, chap. 262, § 3; Laws of 1825, chap. 83, § 3; *Chegaray v. Mayor, etc.*, 13 N. Y. 220; Laws of 1852, chap. 282; Laws of 1882, chap. 410, §§ 824, 827, 1029; *Orphans v. Mayor, etc.*, 38 Hun, 593; Laws of 1853, chap. 301; Dillon on Mun. Corp. [3d ed.] § 773;

Opinion of the Court, per EARL, J.

Cooley on Tax. 173, 174; *People ex rel. v. Board of Supervisors*, 47 Hun, 383.) The premises were owned exclusively by a religious society. (*W. H. M. E. Church v. Mayor, etc.*, 20 Hun, 297; *Schultz v. Mayor, etc.*, 103 N. Y. 307.) When exemption is sought by an institution conducted for private gain, construction is strict, but when gratuitous, liberal. (*People ex rel. v. Comrs.*, 11 Hun, 505.)

EARL, J. Among the property exempted from taxation in the Revised Statutes is the following: "Every building erected for the use of a college, incorporated academy or other seminary of learning; every building for public worship, every school-house, court-house and jail, and the several lots whereon such buildings are situated, and the furniture belonging to each of them." (R. S. part 1, ch. 13 tit., 1 § 4. sub. 3.) Under this provision it has been held that no "seminary of learning" is exempt from taxation unless it is incorporated and that no "school-house" is exempt unless it belongs to the public common school system of the state. (*Chegaray v. Mayor, etc.*, 13 N. Y. 220; *People ex rel. v. Board of Assessors*, 32 Hun, 457, affirmed in this court 97 N. Y. 648; *Association for Colored Orphans v. Mayor, etc.*, 104 N. Y. 581). If, therefore, the exemption here claimed depended upon the Revised Statutes it is clear that it would have to be denied. There has been, however, further legislation. In 1852 (chap. 282), the act "defining the exemptions from taxation on public buildings in the city of New York" was passed, the first section of which is as follows

"The exemption from taxation of every building for public worship and every school-house or other seminary of learning, under the provisions of subdivision three of section four, title one, chapter thirteen of part first of the Revised Statutes, or amendments thereof, shall not apply to any such building or premises in the city of New York, unless the same shall be exclusively used for such purposes, exclusively the property of a religious society, or of the New York Public School Society." And this provision was subsequently embodied in the consolidation act relating to the city of New York, except

Opinion of the Court, per EARL, J.

the last phrase above italicized. (Laws of 1882, chap. 410, § 827). There is some dispute whether at the time this assessment was imposed the act of 1852 or the provision in the act of 1882 was in force, and it is now immaterial to determine the matter.

The provision above quoted is not happily worded, and its precise scope and meaning are not entirely clear, and the language has given some trouble to those who have had to deal with it. (*Association for Colored Orphans v. Mayor, etc.*, 38 Hun, 593). It was apparently the purpose of the act of 1852 to limit and confine in the city of New York the exemptions contained in the Revised Statutes, and not to extend them, and hence the qualifying words "exclusively used for such purposes and exclusively the property of a religious society," were added. But without undertaking to give a precise construction to these qualifying words, we think this at least is clear, that before a school-house can be exempted it must belong to the public school system of the city or be "exclusively the property of a religious society." We have, therefore, only to determine whether this school-house belonged to a religious society. We will assume that it belonged to the society at the time called the Church of St. Monica, although the legal title was held either by the insurance company or Father Dougherty. But that was an unincorporated society, and not, we think, such a society as the law-makers meant to include in the words "religious society," used in the act of 1852. They evidently had in mind religious societies incorporated under the act of 1813 entitled an act "to provide for the incorporation of religious societies," or under some one of the other numerous acts for the same purpose. The words "religious society" when used in the laws of this state, as they frequently are, generally have reference to an incorporated religious society. It cannot be supposed that it was the legislative intention that any number of persons could come together for some religious purpose and set up a school and then claim the exemption. In using the words "religious society" it is most probable that the law-makers had in mind

Statement of case.

some legal entity capable as such of taking and holding property, and popularly known as a religious society.

We are, therefore, of opinion that upon the facts found, the plaintiff was not entitled to the relief claimed, and that the judgment should be reversed, and as there is no probability that the facts can be changed, the complaint should be dismissed with costs.

All concur.

Judgment accordingly.

THE STATEN ISLAND RAPID TRANSIT RAILROAD COMPANY,
Respondent, v. THE MAYOR, ALDERMEN AND COMMONALTY
OF THE CITY OF NEW YORK, Appellants.

Plaintiff was assignee of two leases, executed by defendant, of ferries between New York city and Staten Island; it also owned a railroad which it operated in connection with said ferries. The lessees were bound simply to run their boats to the island; they being free to choose their port of arrival and departure; they agreed to pay defendant certain percentages upon the gross receipts annually. One of the leases fixed the minimum rate of ferriage at five cents per person, the other fixed no minimum rate. Plaintiff selected St. George as the port, and charged for each passenger stopping there ten cents and the same price for passengers taking the railroad to other places, of which it allowed five cents for ferriage. The city had knowledge of this, its commissioner of accounts having investigated plaintiff's books of receipts, ascertained the division made, assented to the basis adopted and thereafter accepted the percentages founded upon that division. In an action to restrain the city from declaring the leases forfeited because of plaintiff's refusal to pay the percentage upon its entire gross receipts, *held*, that plaintiff was entitled to the relief sought; that the fact that one sum was paid for passage over the ferry and railroad did not make the whole, ferry receipts, and plaintiff was not bound to pay the city anything on account of its railroad fares; that the reduction of ferriage to passengers taking the railroad was not violative of the leases; that if plaintiff has made a wrong discrimination among its passengers it is a public wrong and not one to the city as lessor; and that the only question was what have been in truth and in fact the actual ferry receipts, not what they ought to, or might have been.

(Argued December 16, 1889; decided January 14, 1890.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of March, 1889, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to have defendant permanently enjoined from carrying into execution a threat to forfeit certain leases held by plaintiff, as assignee, of a ferry between New York city and Staten Island, and deprive it of the possession of the ferry franchise and the leased premises.

The leases in question were from the foot of Whitehall street and pier one, East river, in the city of New York to Staten Island; they contained no provisions as to the port of arrival and departure from Staten Island; one of them fixed the minimum rate of ferriage for each person at five cents and the other fixed no minimum rate. The lessees covenanted to pay a certain percentage of the gross receipts and a certain amount in addition per annum. Plaintiff owned and operated a railroad on Staten Island and leased and operated another railroad there which also operated one of said ferries as lessee. Plaintiff selected St. George as its port of arrival and departure on Staten Island for both ferries and operated them in connection with the railroad it owned and the one it held as lessee. For each passenger going to St. George it charged ten cents, and for each of those taking either of its railroads it also charged ten cents, treating the ferriage as five cents, and it reckoned the percentage due the city on such fares on that basis. This was done with the knowledge of the commissioner of accounts; he investigated plaintiff's books, assented to the mode of computation adopted and accepted the percentage thus ascertained.

D. J. Dean for appellant. Defendants are entitled to an accounting from plaintiff of the receipts from passengers carried over the ferry. (Laws of 1887, chap. 104, § 2.) The acceptance by defendants of the percentages paid furnish no reason against such accounting. (*Palmerton v. Huxford*, 4 Denio, 167.) The finding of the commissioner of accounts as

Opinion of the Court, per FINCH, J.

to the amount due the city is not conclusive upon defendants. (Laws of 1882, chap. 410, § 110.)

William MacFarland for respondent. The contemporaneous and continued construction of the leases by the parties, the quarterly accountings and receipts in full for a number of years, are conclusive upon the defendant. (*United States v. Allison*, 91 U. S. 303; *Chicago v. Sheldon*, 9 Wall. 54; *C. M. Ins. Co. v. Sherwood*, 14 How. [U. S.] 362.)

FINCH, J. Under both leases of the ferries the lessees were only bound to run their boats to Staten Island. They were free to choose their port of arrival and departure, and were at liberty to have but one. They chose to have but one, and selected St. George as that one, it being the nearest point to New York. The passengers landed there, who desired to go further, were carried by rail to points on the north and east shore. The lessees of the ferry were also the owners of the railroad. That ownership was theirs absolutely, and the lines owed no tribute to the city of New York. If, under the old system, the boats coasted both shores, no law prevented a change, and the leases imposed no obligation beyond a ferry to the island. The lessees were bound to pay certain percentages on the gross ferry receipts. They were not bound to pay upon the railroad receipts. Where one sum was paid for one passenger over the ferry and over the railroad, that did not make the whole of such sum ferry receipts. The ferry owned part, and the railroad part, and the only question possible would be one of equitable division and distribution. The lessees made such distribution. So far as we can see, it was a fair division of the total charge between the ferry on the one hand and the railroad on the other. The city had full knowledge of it. By its commissioner of accounts it investigated the books of the lessees, ascertained the division made, assented to the basis adopted, and thereafter accepted the percentages founded upon that division. But all this time, the city, it seems, was asleep, and at last woke up. Its officers knew that

Opinion of the Court, per FINCH, J.

the lessees charged ten cents for every passenger carried to St. George, and ten cents to his destination for every passenger who crossed the ferry and went on over the Rapid Transit lines, and insisted that the latter ten cents was, like the former, all ferriage and gross receipts of the water route. For the purpose of tribute to the city, the railroad had no fares but ran for nothing. The argument may be formulated thus: The lessees charge a passenger to St. George ten cents; that, therefore, is the rate of ferriage; if they take another passenger to St. George and then beyond on the railroad also for ten cents, the ferriage remains the same and the railroad fare is nothing. The argument assumes that the lessees carry both passengers across the water for the same price. They do not. The railroad fare, by itself, is five cents, or just half of the whole sum paid. In other words the passenger who stops at the shore pays ten cents for his ferry passage, but he who goes inland over the railroad pays five cents for his ferry passage and five more for the railroad fare. To such passengers the ferriage is reduced one-half. The leases permit it. One of them fixes no minimum rate of ferriage, and the other makes it five cents. Below that the lessees have not gone. They have a right to carry passengers for five cents across the water, and they do carry one class of them for that because they pay as much more to the railroad. The trouble is, and is only, that they charge other passengers who stop at St. George ten cents. The corporation counsel concedes that the lessees might charge all passengers alike five cents ferriage, and if it did that, the city could not and would not complain. The objection then is, at bottom, that the lessees discriminate between their passengers and charge one man twice as much as another. Is it the business of the city as lessor to redress that wrong, if it be one? Is it the general guardian of all the common-carriers within its limits? If the discrimination is wrong, it is a public wrong, and not at all one to the city in its character of lessor. Its complaint in that character strikes me at least as odd. It is, that, instead of charging five cents ferriage for every passenger and so reduc-

Opinion of the Court, per FINCH, J.

ing the basis of the city's revenue, it obstinately persists in charging some passengers ten cents, and so increases the city's revenue from the ferriage. Passing by the moral attitude of such a claim, its business attitude as between lessor and lessee is indefensible. If there is discrimination, the city gets the benefit of it, and cannot question what does not harm it and what its contract permits. So far as lessor and lessee are concerned, the only question is, what have been in truth and in fact the actual ferry receipts, not what they ought to have been or might have been ; and so whether the ferry fare to railroad passengers has been actually reduced to five cents, or kept as to those passengers at ten cents, the rapid transit fare being nothing. The situation itself and the acts of the parties in respect to it are sufficient to settle that question as it was settled by the courts below.

The city's contention, if successful, would necessarily end in one of three things. Either all ferriage would drop to five cents, so as to leave five more for the transit line, in which case the gross receipts, and so the city's percentage, would be reduced ; or the price to railroad passengers would go to fifteen cents, because the ferriage alone must be ten, and the railroad could not run for less than five, in which case the public welfare for which the city pleads would suffer ; or the lessees would be obliged to pay to the city a percentage upon their railroad as well as their ferry earnings which would be clearly unjust.

We think the parties themselves settled the matter upon a fair basis and adopted a just construction.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

Statement of case.

JONAS P. VARNUM, as Receiver, etc., Respondent, v. E. KIRK
HART et al., Impleaded, etc., Appellants.

The provision of the Revised Statutes (1 R. S. 603, § 4) prohibiting an insolvent corporation or any of its officers from assigning or disposing of its property for the payment of a debt, and prohibiting any assignment or transfer in contemplation of insolvency, does not impose upon the officers of an insolvent corporation the duty to take measures to procure a disposition of its property without preferences among all its creditors.

While the purpose of the provision was to prevent unjust discrimination, this was sought to be accomplished not by securing affirmative action, but by restraint upon the action of the corporation and its officers, leaving the property to be taken and disposed of by due course of law, and the corporation may, like an insolvent person, permit the creditors to take hostile proceedings and allow those to obtain a preference who are most vigilant; this does not constitute an assignment or transfer on its part.

An insolvent corporation is not obliged to defend any suit brought against it for a valid debt, against which there is no valid legal defense, for the sole purpose of defeating a preference; it may suffer default and thus allow a preference.

Certain creditors of a corporation, whose claims against it were valid and past due, and against which there was no defense, knowing the corporation to be insolvent, and for the purpose of obtaining a preference over other creditors, commenced action against it, the summons being served upon D., one of its directors, under an arrangement with him that he would not disclose the service to the other officers; he carried out the agreement and suffered said creditors to obtain judgment by default. The corporation had no real estate and its personal property was levied upon and sold under execution issued on said judgments. In an action brought by a receiver of the corporation, appointed subsequent to the levy, to have the judgments declared void and set aside, *held*, that the arrangement did not constitute an assignment or transfer; that there was no violation of said statute; and that the action was not maintainable.

The claim was made upon the part of plaintiff on appeal that the sale under the execution after the appointment of the receiver was absolutely void. *Held*, untenable, as no such cause of action was set forth in the complaint, and there was no finding in reference thereto by the trial court.

Also *held*, that as the sheriff had seized upon the property and had it in his possession at the time of the appointment of the receiver the sale was not absolutely void, but at most could be held to be simply irregular.

Walling v. Miller (108 N. Y. 173) distinguished.

119	101
185	534

119	101
127	515

119	101
145	443

119	101
155	490

119	101
159	496

119	101
163	346

Statement of case.

Another creditor commenced his action by service of summons on the president of the corporation. At a meeting of its directors held the next day, a resolution was passed authorizing an attorney to appear for it and offer judgment for the amount of the claim; this the attorney did, and, four days after the service, judgment was entered on the offer, and execution issued thereon. It was then arranged between said creditor and the other judgment creditors, three in number, whose executions had been levied, that the sheriff should sell by virtue of all the executions and apply the proceeds *pro rata* thereon. The proceeds of sale were not sufficient to satisfy the three executions first levied. *Held*, that assuming the last judgment was in violation of the statute and so void, as to which *quære*, this did not invalidate the sale; that as the valid executions had the prior lien and this was more than the proceeds, they justified and upheld the sale, and the presence of the other execution in the hands of the sheriff, which even if valid, was not entitled to any of the proceeds, could work no harm.

People v. Hagadorn (104 N. Y. 516) distinguished.

(Argued December 18, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court, in the fifth judicial department, which modified and affirmed as modified a judgment in favor of plaintiff against the defendants, Hart, Ellwanger and Atkinson, entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiff, as receiver of the Evening Express Printing Company, against said defendants and defendant Miller, to have adjudged void and to set aside judgments obtained by said defendants against the insolvent corporation, and to compel the defendants to refund the proceeds of the sale of its property under execution. The action was based on the ground that said judgments were obtained in violation of the Revised Statutes (1 R. S. 603, § 4.) On the first trial of the action the judgments and executions and sale were adjudged void, and separate judgments were rendered against the defendants, except Atkinson as to whom the complaint was dismissed. The other defendants except Miller appealed, and the judgments against the appellant were reversed. On the second trial a joint judgment was rendered against the defendants for the whole amount claimed. This was modified by the General Term as to the form of execution.

The further material facts are stated in the opinion.

Statement of case.

James Breck Perkins and *Joseph S. Hunn* for appellant. The plaintiff is estopped by the record from maintaining this action against Hart. (2 Bliss' Code, 550, § 2429; *Tuska v. O'Brien*, 68 N. Y. 446; *Ibbotson v. Sherman*, 10 J. & S. 477.) There is an estoppel *in pais* against the plaintiff. (*Hawley v. Griswold*, 42 Barb. 18; *Walrath v. Redfield*, 18 N. Y. 457, 461; *Tilton v. Nelson*, 27 Barb. 595; *Voorhees v. Olmstead*, 66 N. Y. 113; *Blair v. Wait*, 69 id. 113; *Dezell v. Odell*, 3 Hill, 215; *S. H. Co. v. E. H. Co.*, 90 N. Y. 607.) The plaintiff's right of action was lost by the repeal of the statute. (*Victor Co. v. Beecher*, 97 N. Y. 651.) The evidence does not show an illegal transfer contrary to the provisions of the statute. (*Van Alstyne v. Cook*, 25 N. Y. 489; *Dutcher v. I. & T. Bank*, 59 id. 5; *Paulding v. C. S. Co.* 94 id. 334, 339; *Prentiss v. Nichols*, 100 id. 227, 230; *Hunt v. Mortimer*, 10 B. & C. 44; *Kingsley v. F. N. Bank*, 31 Hun, 329; *In re Waterbury*. 8 Paige, 380, 383-384; *Chamberlain v. R. P. Co.* 7 Hun, 557.) The evidence of Upton's conversation with Ellwanger and Rew and Tracy was improperly received against Hart. (*Gutches v. Gutches*, 66 Barb. 483; *Bowen v. Bank of Newport*, 11 Hun, 226, 229.)

Martin W. Cooke for respondent. The judgments were void. (*Manning v. Brick*, 26 N. Y. S. R. 483; 129 U. S. 329.) If any one of the judgments was void the sale was wrongful and void. (*People v. Hagadorn*, 104 N. Y. 519.) There was no estoppel. (Code Civ. Pro. §§ 1788, 2429; R. S. chap. 8, art. 3, §§ 66-89; *Att'y-Gen'l v. L. & F. Ins. Co.*, 4 Paige, 224, 225; 2 R. S. 464, § 42; *Tuska v. O'Brien*, 68 N. Y. 446; *Pray v. Hegeman*, 98 id. 351; 3 R. S., 2399, § 68; *Royce v. Watrous*, 73 N. Y. 597.) The facts of the case show that these parties were not *bona fide* purchasers of the property. If they were not, the receiver is entitled to recover from them for its value, defendants having disposed of it. (R. S. chap 18, tit. 4, § 4; Story's Eq. Juris. § 1252; Morawetz on Corp. § 863; *Kingsley v. F. N. Bank*, 31 Hun, 329; Code Civ. Pro. §§ 1785, 1786.) The sale and

Opinion of the Court, per EARL, J.

conversion of the property of the corporation on the 19th of April, 1882, was in violation of the order of the court, and the appropriation of property, the title to which was in the receiver, and so was void. (*Walling v. Miller*, 108 N. Y. 173.) There was no error in the admission or rejection of evidence for which the judgment should be disturbed. (*People v. Gonzalez*, 35 N. Y. 49, 60; *Messner v. People*, 45 id. 1, 10; *Forrest v. Forrest*, 25 id. 501, 510; Code of Pro. § 2545; *In re Smith*, 95 N. Y. 516, 527.)

EARL, J. To maintain this action it must be held that the judgments against the Evening Express Printing Company and the sale of its property under the executions issued thereupon worked a transfer of the property of the corporation in violation of the provisions of the Revised Statutes which declare that "whenever any incorporated company shall have refused the payment of any of its notes or other evidence of debt in specie or lawful money of the United States, it shall not be lawful for such company or any of its officers to assign or transfer any of the property or choses in action of such company to any officer or stockholder of such company, directly or indirectly, for the payment of any debt; and it shall not be lawful to make any transfer or assignment in contemplation of the insolvency of such company to any person or persons whatever; and every such transfer and assignment to such officer, stockholder or other person or in trust for them or their benefit shall be utterly void." (R. S. part 1, chap. 18, tit. 4, § 4.) None of the plaintiffs in the judgments were officers or stockholders of the corporation, and hence the last clause of the section quoted only can be claimed to have any application to this case.

It is undoubtedly true that it was the purpose of the provision to prevent unjust discrimination among creditors of an insolvent corporation. But this was to be accomplished in only one way, to wit.: by restraint upon the action of the corporation and its officers. They having the best and the earliest knowledge of the actual or impending insolvency, were

Opinion of the Court, per EARL, J.

not to transfer or assign any of its property so as to give any preference or advantage therein to any person ; but the purpose was in such case to leave the property to be taken or disposed of by due course of law. The officers of a corporation are under no legal duty in the case of its insolvency to take measures to procure a disposition of its property, without preference, among all its creditors. They may, like an insolvent person, permit the creditors to take hostile proceedings and allow those to obtain preferences who are the most vigilant. The statute places no restraint whatever upon the creditors, and they are permitted to pursue their remedies in all the ways allowed by the law, and to procure satisfaction of their claims if they can. Furthermore, the statute contemplates no affirmative action on the part of the corporation, and it cannot be violated by mere silence or omission to act on its part or the part of its officers. An insolvent corporation is not obliged to defend any suit brought against it for the sole purpose of defeating a preference, and it may in such case suffer default and thus allow a judgment to be obtained against it, knowing that the creditor designs to obtain, and will thus obtain, a preference. Such conduct on its part does not constitute a transfer or assignment of its property, and there is nothing in the statute which condemns judgments thus obtained.

Preferences by judgments were condemned in the National Bankrupt Acts by the express language used therein. In the act in reference to moneyed corporations (Laws of 1882, chap. 409, § 187) we find this language: "No such conveyance, assignment or transfer, nor any payment made, judgment suffered, lien created or security given by any such corporation when insolvent, or in contemplation of insolvency, with the intent of giving a preference, etc., shall be valid in law ;" and the Revised Statutes (part 2, chap. 4, tit. 1, art. 1, § 20), in reference to limited partnerships, provides as follows: "Every sale, assignment or transfer of any of the property or effects of such partnership, * * * and every judgment confessed, lien created or secured, * * * shall be void." It is thus seen that when law-makers intend to prevent preferences by

Opinion of the Court, per EARL, J.

judgments in the case of insolvent corporations or persons, they have not deemed the words "transfer," "assignment," "conveyance," "sale" sufficient for that purpose, but have specially named judgments. The provisions as to limited partnerships came under consideration in *Van Alstyne v. Cook* (25 N. Y. 489), and the court there said that they "do not avoid payments made or judgments suffered, or require a creditor to account for anything received by the creditor of the partnership or of either of the partners. * * * These sections clearly do not inhibit or apply to judgments recovered against the members of a limited partnership *in invitum*, or suffered by them by default or otherwise."

Now, what are the facts as to these judgments? We will for the present confine ourselves to the judgments in favor of Hart, Miller and the bank. They were all recovered, as the trial court found, for valid debts past due, and the debts being such, it does not appear that there was any just or legal defense which could have been interposed to them. They were recovered by default after legal service of the summons in each case upon Tracey, one of the directors of the company, and also its secretary, treasurer and financial manager. It is quite true that they acted in concert, and that they knew that the company was insolvent and meant to gain a preference in the payment of their claims over other creditors. But all this is unimportant. The statute could not be violated by any act, conduct or intention on their part. They were under no statutory restraint. So they did not violate the statute by arranging with Tracey that he should not disclose the service of the summons upon him to the other officers of the company. Nor was the statute violated because Tracey did not disclose the service of the summons to the other officers. He did nothing. He suffered the plaintiffs to obtain their judgments, but did not assign or transfer any property. Suppose he had disclosed the service of the summons, the statute would not have been violated if all the officers had then remained silent and had thus suffered the judgments to be obtained, and if they had so acted for the express purpose of

Opinion of the Court, per EARL, J.

allowing the plaintiff in those actions to obtain the first judgments, and thus the first chance of payment. It is true that the other officers, if they had known of the commencement of the actions, might have taken measures to defeat any preference and for an equal distribution of the corporate assets among all the creditors of the corporation. But they would not have been bound to do so, and it remains true that in all that was done or authorized to be done, there was no assignment or transfer of property and no violation of the statute. If there had been any defense to the actions, there was ground for an application to the court to set aside the judgments and open the defaults; but there is no ground for holding the judgments absolutely void as in violation of the statute.

The argument of the plaintiff would have more force (we do not say would be valid) if the corporation had had real estate upon which the judgments became liens. It had only personal property, and thus the judgments were simply a higher form of obligation than the plaintiffs therein before had for their claims. The executions were issued by the plaintiffs, and the seizure and sale of the property were by the sheriff, and it does not appear that, in reference to them, there was any active interference on the part of the officers of the corporation which could be claimed to be in violation of the statute.

The judgments were entered on the 3d day of March, 1882, and on the same day executions were issued to the sheriff, and he levied upon the property and took it into his possession. Subsequently, on the tenth day of April, an action was commenced against the corporation by the people for its dissolution, and such proceedings were had therein, that on the twelfth day of April the plaintiff was appointed its receiver, and thereafter entered upon the discharge of his duties as such. On the nineteenth day of April the sheriff sold the property by virtue of the executions. The claim is now made that on account of the appointment of the receiver, the sale of the property was absolutely void, and that for that reason the plaintiff was entitled to recover in this action. It is sufficient

Opinion of the Court, per EARL, J.

to say that no such cause of action was alleged in the complaint, and there was no finding in reference thereto by the trial judge. Besides, the sheriff having seized the property, the sale thereof by him after the appointment of a receiver, while the property was in his possession and not in the possession of the receiver, was not absolutely void, and could at most be held to be irregular; and the case of *Walling v. Miller* (108 N. Y. 173) does not uphold the plaintiff's contention, as there the property was sold by the sheriff after the title had passed to the receiver, and while it was in his possession.

But the case of *Ellwanger* stands upon a different footing. He commenced an action upon his claim against the corporation by service of the summons upon its president on the 3d day of March, 1882. The directors held a meeting on the fourth day of March and resolved that an attorney should be authorized to appear in the action and offer judgment for the amount of the claim. Thereafter, on the sixth day of March, the attorney of the corporation did appear and offer judgment, and on the same day judgment based upon the offer and the acceptance thereof was entered; and on the same day execution was issued thereon and placed in the hands of the sheriff. On the eighth day of April thereafter Hart, Miller, the bank and Ellwanger made an arrangement that the sheriff should sell the property by virtue of the four executions, and that the proceeds of the sale should be applied *pro rata* thereon. The property brought at the sheriff's sale \$20,000, which was its full value, and that sum was applied according to the agreement. The judgments in favor of Hart, Miller and the bank were in the aggregate for some \$20,000, and the property sold was not sufficient to satisfy the three executions first levied, and all that Ellwanger received of the proceeds of the sale he received by virtue of the agreement made with the other execution creditors. Upon these facts the plaintiff claims especially that the judgment of Ellwanger was in violation of the statute and void, and as the sale was made under all the judgments it was illegal and void. It is quite true that the judgment of

Statement of case.

Ellwanger stands upon a different footing from the others. It was obtained in consequence of the affirmative action of the corporation taken for the express purpose of giving him some advantage in its property. We will assume, without deciding it, that that judgment was in violation of the statute and, therefore, void (*Kingsley v. First Nat. Bank*, 31 Hun, 329); and yet the sale for that reason was not illegal and void. The valid executions had the prior lien and right, and as they were of greater amount than the whole of the corporate property sold, the presence of the invalid execution in the hands of the sheriff could work no harm. The valid executions uphold and justify the sale, and the sale must be referred to them if the other execution was void. Even if Ellwangers' execution had been valid, he could not legally have received one dollar from the proceeds by virtue thereof, as all the property levied on was insufficient to satisfy the three executions having the prior right. This is unlike the case of a tax sale where real estate is sold for taxes, some of which are illegal, because there is the right in such a case of redemption which could not be exercised except by the payment of the illegal tax. (*People v. Hagadorn*, 104. N Y. 516.)

Therefore, without considering other objections to the judgment which have been ably argued and fully presented in the learned briefs, we are of opinion that the judgment against the appellants should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

THOMAS LACY, Respondent, v. SOPHRONIA A. GETMAN, as
Executrix, etc., Appellant.

119	109
146	339
119	109
163	856

While the common-law rule that the contract relations of master and servant are dissolved by the death of either party, has been limited, it still applies in cases in which the relation may be deemed purely personal and involves neither property rights nor independent action; it applies both to the contract of the master and to that of the servant, and

Statement of case.

includes as well cases where the services are those of unskilled as where they are of skilled labor.

Plaintiff contracted orally with McM., defendant's testator, to work upon his farm as an ordinary farm laborer for one year, commencing in March. Plaintiff entered upon the service and worked under the direction of McM. until in July when the latter died, leaving a will by which he gave his widow a life estate in the farm and the use and control for life of all his personal property in the house and on the farm. Plaintiff knew in a general way the terms of the will; he continued on without being hired or employed by McM.'s executrix until the close of the year, doing the farm work under the direction of the widow. In an action against the executrix to recover for his services for the whole year, *held*, that upon the death of McM. the contract terminated, and the plaintiff was only entitled to recover the proportionate amount earned at the death of McM.

(Argued December 19, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 2, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

Elon R. Brown for appellant. Where performance of a contract for personal services is rendered impossible by the death of one of the parties, no recovery can be had for services not already rendered. (*Farrow v. Wilson*, L. R. [4 C. P.] 744; *People v. G. M. L. Ins. Co.*, 91 N. Y. 174; *Babcock v. Goodrich*, 3 How. Pr. 52, 53; *Lacy v. Getman*, *id.* 250; *Austin v. Monroe*, 4 Lans. 67; 47 N. Y. 360; *Boast v. Firth*, L. R. [4 C. P.] 1; 71 N. Y. 44; *Wolf v. Howes*, 20 *id.* 197; 24 Barb. 174, 666; *Fahey v. North*, 19 *id.* 341; *Clark v. Gilbert*, 32 *id.* 576, 581; 26 N. Y. 279; *Spalding v. Rosa*, 71 *id.* 40; *Seymour v. Caggar*, 13 Hun, 29; *Farrow v. Wilson*, L. R. [4 C. P.] 743.) This action is brought against the executor as such and not against her upon any individual liability incurred by her in the administration of the estate.

Opinion of the Court, per FINCH, J.

The question of liability, therefore, rests upon the original contract exclusively, and not upon any subsequent dealings between the plaintiff and the executor. (*Ferrin v. Myrick*, 41 N. Y. 315.)

W. A. Nims for respondent. The death of the employer did not terminate the contract; death was a condition which would not affect it except by express stipulation. (*Tompkins v. Dudley*, 25 N. Y. 272; *Williams v. Vanderbilt*, 25 id. 217; *Booth v. S. D. R. M. Co.*, 60 id. 487; *Dexter v. Norton*, 47 id. 62; *Wheeler v. C. M. L. Ins. Co.*, 82 id. 543; *Devlin v. Mayor, etc.*, 63 id. 14-18.) The only exception to the rule of law above stated is in the case of a contract contemplating skilled personal services. (*Wolfe v. Howes*, 26 N. Y. 197; *Spalding v. Rosa*, 71 id. 40; *Devlin v. Mayor, etc.*, 63 id. 14-18; *People v. G. M. L. Ins. Co.*, 91 id. 179-180; 1 Pars. on Cont. [7th ed.] 145.) The contract in the case at bar contemplated unskilled, ordinary farm labor, and does not fall within the exceptions above noted. (*Martin v. Hunt*, 1 Allen, 418; 71 N. Y. 40; *Quick v. Ludbaum*, 3 Bulst. 30; *Wentworth v. Cook*, 11 A. & E. 42.) It is an elementary principle of the law governing contracts that "when the contract is executory in its nature, and a personal representative can fairly and sufficiently execute all that the original contractor could have done, it is not terminated by the death of either of the contracting parties." (1 Pars. on Cont. [7th ed.] 145; *Martin v. Hunt*, 1 Allen, 418; *Wentworth v. Cook*, 11 A. & E. 42; *Wolfe v. Howes*, 20 N. Y. 197-200; *Spalding v. Rosa*, 71 id. 40; *Wheeler v. C. M. L. Ins. Co.*, 82 id. 543-550; 3 Williams on Exrs. 1826-7.)

FINCH, J. The relation of master and servant is no longer bounded by its original limits. It has broadened with the advance of civilization until the law recognizes its existence in new areas of social and business life, and yields in many directions to the influence and necessities of its later surround-

Opinion of the Court, per FINCH, J.

ings. When, therefore, it is said generally, as the commentators mostly agree in saying, that the contract relations of principal and agent, and of master and servant, are dissolved by the death of either party, it is very certain that the statement must be limited to cases in which the relation may be deemed purely personal, and involves neither property rights nor independent action. Beyond that, a further limitation of the doctrine is asserted, which approaches very near to its utter destruction, and is claimed to be the result of modern adjudication. That limitation is that the rule applies only to the contract of the servant, and not to that of the master, and not at all, unless the service employed is that of skilled labor peculiar to the capacity and experience of the servant employed, and not the common possession of men in general; and it is proposed to adopt as a standard or test of the limitation an inquiry in each case whether the contract on the side of the master can be performed after his death by his representatives substantially, and in all its terms or requirements, or cannot be so performed without violence to some of its inherent elements.

The agitation of that question has kept the present case passing like a shuttle between the trial and the appellate courts, until it has been tried four times at the circuit and reviewed four times at General Term, and at last has been sent here in the hope of securing a final repose.

The facts are few and undisputed on this appeal. The plaintiff, Lacy, contracted orally with defendant's testator, McMahan, to work for the latter upon his farm, doing its appropriate and ordinary work for a period of one year at a compensation of two hundred dollars. Lacy entered upon the service in March, doing from day to day the work of the farm under the direction of its owner, until about the middle of July, when McMahan died. By his will he made the defendant executrix, but devised and bequeathed to his widow a life estate in the farm, and the use and control of all his personal property whatsoever in the house and on the farm, during the term of her natural life. Lacy knew in a general way the

Opinion of the Court. per FINCH, J.

terms of the will. He testifies that he knew that it gave to the widow the use of the farm and that she talked with him about the personal property. It is admitted that the executrix did not hire or employ him, but he continued on to the close of the year, doing the farm work under the direction of the widow until the end of his full year. He sued the executrix upon his contract with the testator, and has recovered the full amount of his year's wages. From that decision the executrix appeals, claiming that the judgment should have been limited to the proportionate amount earned at the death of McMahan, and that the death of the master dissolved the contract.

It is obvious at once that an element has come into the case as now presented, which was not there when the General Term first held that the contract survived. It now appears that the executrix could not have performed her side of the contract at all after the death of McMahan, by force of her official authority, because she had neither the possession of the farm or personal property upon it, and no right to such possession during the life of the widow. She had no power to put her servant upon the land, or employ him about it, and in her representative character she had not the slightest interest in his service and could derive no possible benefit from it. The plaintiff's labor, after the death of McMahan, was necessarily on the farm of the widow, by her consent, for her benefit, and under her direction and control, and equitably and justly should be a charge against her alone. The test of power to perform on the part of the personal representative of the deceased fails in the emergency presented by the facts, except possibly upon proof of the consent of the widow.

We have then the peculiar case of a contract made to work *for* McMahan and under his direction and control, which could not be performed because of his death, transmuted into a contract to work *for* Mrs. Getman upon a farm which she did not possess and had no right to enter; and performed by working for the widow and under her direction and control alone; and this because of the supposed rule that the contract

Opinion of the Court, per FINCH, J.

survived the death of the master and remained binding upon his personal representatives.

It is true that some interest in the personal property on the farm is claimed to have vested in the executrix, notwithstanding the terms of the will, and the inventory filed by her is appealed to, and the necessity of a resort to the personal property with which to pay debts. There is no proof that the testator owed any debts, and the inventory covers nothing as to which Lacy's labor was requisite or necessary, except possibly some corn on the ground valued at eighteen dollars. All the grain inventoried was in the barn, needing only to be threshed, and must be assumed to have been there when testator died; and the other property consisted of farm tools and a cow and horse, to the use of which the widow was entitled and which, if sold to pay possible debts, would have left the servant without means of doing his work and with nothing to do, unless for the widow. So that the bald question is presented whether the contract survived the testator's death and bound his executrix, who was without power or authority of her own to perform, and had no interest in performance.

It seems to be conceded that the death of the servant dissolves the contract. (*Wolfe v. Howes*, 20 N. Y. 197; *Spaulding v. Rosa*, 71 id. 40; *Devlin v. Mayor, etc.*, 63 id. 14; *Fahy v. North*, 19 Barb. 341; *Clark v. Gilbert*, 32 id. 576; *Seymour v. Cagger*, 13 Hun, 29; *Boast v. Firth*, L. R. [4 C. P.] 1.) Almost all of these cases were marked by the circumstance that the services belonged to the class of skilled labor. In such instances the impossibility of a substituted service by the representative of the servant is very apparent. The master has selected the servant by reason of his personal qualifications, and ought not, when he dies, to abide the choice of another or accept a service which he does not want. While these cases possess, with a single exception, that characteristic, I do not think they depend upon it. *Fahy v. North* was a contract for farm labor, ended by the sickness of the servant, and quite uniformly the general rule stated is that the servant's agreement to render personal services is dissolved by his death.

Opinion of the Court, per FINCH, J.

There happens a total inability to perform; it is without the servant's fault; and so further performance is excused and the contract is apportioned. If in this case, Lacy had died on that day in July, his representative could not have performed his contract. McMahan, surviving, would have been free to say that he bargained for Lacy's services, and not for those of another selected and chosen by strangers, and either the contract would be broken or else dissolved. I have no doubt that it must be deemed dissolved, and that the death of the servant, bound to render personal services under a personal control, ends the contract, and irrespective of the inquiry whether those services involve skilled or common labor. For, even as it respects the latter, the servant's character, habits, capacity, industry, and temper, all enter into and affect the contract which the master makes, and are material and essential where the service rendered is to be personal and subject to the daily direction and choice and control of the master. He was willing to hire Lacy for a year; but Lacy's personal representative, or a laborer tendered by him, he might not want at all and at least not for a fixed period, preventing a discharge. And so it must be conceded that the death of the servant, employed to render personal services under the master's daily direction, dissolves the contract. (*Babcock v. Goodrich*, 3 How. Pr. [N. S.] 53.)

But if that be so, on what principle shall the master be differently and more closely bound? And why shall not his death also dissolve the contract? There is no logic and no justice in a contrary rule. The same reasoning which relieves the servant's estate relieves also the master's, for the relation constituted is personal on both sides and contemplates no substitution. If the master selects the servant, the servant chooses the master. It is not everyone to whom he will bind himself for a year, knowing that he must be obedient and render the services required. Submission to the master's will is the law of the contract which he meditates making. He knows that a promise by the servant to obey the lawful and reasonable orders of his master within the scope of his contract is implied by law; and a breach of this promise in a material matter jus-

Opinion of the Court, per FINCH, J.

tifies the master in discharging him. (*King v. St. John, Devizes*, 9 B. & C. 896.) One does not put himself in such relation for a fixed period without some choice as to 'whom he will serve. The master's habits, character, and temper enter into the consideration of the servant before he binds himself to the service, just as his own personal characteristics materially affect the choice of the master. The service, the choice, the contract are personal upon both sides, and more or less dependent upon the individuality of the contracting parties, and the rule applicable to one should be the rule which governs the other.

If now, to such a case—that is to the simple and normal relation of master and servant, involving daily obedience on one side and constant direction on the other—we apply the suggested test of possibility of performance in substantial accord with the contract, the result is not different. It is said that if the master dies his representatives have only to pay, and anyone may do that. But under the contract, that is by no means all that remains to be done. They must take the place of the master in ordering and directing the work of the farm, and requiring the stipulated obedience. That may prove to effect a radical change in the situation of the servant, as it seems to have done in the present case, leading the plaintiff to the verge of refusing to work further for either widow or executrix, whose views apparently jangled. The new master cannot perform the employer's side of the contract as the deceased would have performed it, and may vary so far, from incapacity or fitful temper or selfish greed, as to make the situation of the servant materially and seriously different from that which he contemplated and for which he contracted.

We are, therefore, of opinion that in the case at bar the contract of service was dissolved by the death of McMahan, and his estate was only liable for the services rendered to the date of his death.

The judgment should be reversed and a new trial granted with costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

ANNIE CARR as Executrix, etc., Appellant, v. JOHN C. RISCHER,
Respondent.

It seems an action against a director of a corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848) to recover a debt due from the company because of failure of defendant to make and file an annual report as required by the act (§ 12) is a penal action and abates upon the death of either party before verdict.

But when judgment is rendered, the original wrong is merged therein and the judgment becomes property with all the attributes of a judgment in an action *ex contractu*.

The action, therefore, does not absolutely abate upon death of the defendant after judgment.

Nor does a reversal of the judgment by the General Term strike it out of existence for every purpose ; although a new trial may not be had, the judgment may be restored on appeal to this court and the action may be continued for that purpose.

It seems in case the death occurs after appeal to this court from an order of the General Term reversing the judgment, and the legal representatives of the decedent are not substituted, this court must take action as prescribed by the Code of Civil Procedure (§ 1298) where either party dies pending an appeal.

Reported below, 50 Hun, 147.

(Argued December 20, 1889 ; decided January 14, 1890.)

MOTION to dismiss appeal from order of the General Term of the Supreme Court in the first judicial department made November 23, 1883, which reversed a judgment in favor of plaintiff entered upon a verdict.

The facts so far as material are stated in the opinion.

John H. V. Arnold for appellant. That the negotiable bonds in suit, regular on their face, were regularly issued, is presumed as a matter of law. The formalities necessary to give validity to the bonds prior to issuing them are presumed to have been duly complied with. (Lawson on Pres. Ev. 62 ; *Jones v. G. Co.*, 101 U. S. 622 ; *Ellsworth v. S. L. & T. H. R. R. Co.*, 33 Hun, 7 ; *Curtiss v. Learitt*, 15 N. Y. 1 ; *Martin v. N. F. P. M. Co.*, 44 Hun, 130 ; *P. R. R. Co. v. Lewis*, 33 Penn. St. 33 ; *Trustees, etc., v. McKechnie*, 90 N. Y. 618 ; *Solomon's Lodge v. Montmolin*, 58 Ga. 547.) The seal on the

Statement of case.

bonds in suit is duly proved, and is presumed to have been regularly affixed. (*Borst v. Empie*, 5 N. Y. 33; *Stephens on Ev.* 130, 420; *McPherson v. Rathbone*, 11 Wend. 97; 5 Cow. 485; 9 id. 148; 2 Starkie on Ev. 341; *Solomon's Lodge v. Montmolin*, 58 Ga. 547; *Trustees, etc. v. McKechnie*, 19 Hun, 62; *Tenny v. L. Co.*, 43 N. H. 343; *Stebbins v. Merritt*, 10 Cush. 27, 34; *Angel & Ames on Corp.*, §§ 217, 224, 226; *Commercial Bk. v. Kortwright*, 22 Wend. 345; *Lovett v. S. S. M. Co.*, 6 Paige, 54; *Johnson v. Bush*, 3 Barb. Ch. 207; *Bk. of Vergennes v. Wilson*, 7 Hill, 91, 95; *Angel & Ames on Corp.*, § 224; *Reed v. Bradley*, 17 Ill. 321; *Brounker v. Atkins*, Skin. 2; *Hoyt v. Thompson*, 5 N. Y. 335; *Mill Dam Foundry Co. v. Hovey*, 21 Pick. 417; *Corrigan v. T. D. F. Co.*, 5 N. J. Eq. 52; *Trustees, etc. v. McKechnie*, 19 Hun, 62; *McKay v. Lasher*, 50 id. 383; *Hall v. Van Vranken*, 28 id. 403.) The obligation of the company to pay the bonds in suit was a debt within the meaning of the statute. (*People v. Snyder*, 41 N. Y. 397; 51 Barb. 589; *Leggett v. Bank*, 24 N. Y. 291; *Jones v. Barlow*, 62 id. 202, 212; 3 Blackstone's Comm. 154; 2 Hill, 220; *Vincent v. Sands*, 1 J. & S. 511; 58 N. Y. 673; *Vernon v. Palmer*, 16 id. 231; 14 Wkly. Dig. 324; *Jones v. Barlow*, 62 N. Y. 204; *Andrews v. Murray*, 9 Abb. Pr. 8; *Denny v. M. Co.*, 2 Hill, 233; *Garrison v. Howe*, 3 E. D. Smith, 458.) The corporation was liable to pay the bonds without proof of sealing at all—the instruments being apparently bonds of the corporation. (*Angel & Ames on Corp.* [10th ed.] §§ 219, 231, 236, 237, 296; *Barry v. M. E. Co.*, 1 Sandf. Ch. 280; *Curtiss v. Leavitt*, 15 N. Y. 9, 62; *Smith v. Law*, 21 id. 296; *Daniel on Neg. Ins.*, § 382; *Leinhauf v. Calman*, 110 N. Y. 50, 54.) The defendant's contention that plaintiff was, at most, only entitled to interest on the amount of the eleven bonds from the commencement of the action, cannot be sustained. (*Blake v. Griswold*, 103 N. Y. 430; *Trinity Church v. Vanderbilt*, 98 id. 170; *Smedes v. Houghtalling*, 3 Ca. 48; *People v. New York*, 5 Cow. 331; 1 Am. L. C. 497; *Spencer v. Pierce*, 5 R. I. 63; *Durfee v. O'Brien*, 6 N. E. R. 492; *Palmer v. Conly*, 4 Denio, 374,

Statement of case.

376; *Cutlers v. Ruskin*, Skin. 363; *Crosset v. Ogilvie*, 5 Brown's P. C. 527; *College v. Harrison*, 9 B. & C. 524; Potter's Dwarries on Stat. 254; *North v. Wingate*, Cro. Car. 559; *Mayor, etc., v. Werring*, Willes, 440; *Company of Cutlers v. Ruslin*, Skin. 365.) The presumption from the evidence is that no annual report was filed, and the question as to the filing of the report was properly taken from the jury. (*Mandeville v. Reynolds*, 68 N. Y. 528; 5 Hun, 338; *Hall v. Kellogg*, 16 Mich. 135; *Lazier v. Westcott*, 26 N. Y. 146; *Williams v. E. I. Co.*, 3 East, 192; *King v. Hawkins*, 10 id. 211, 216; *Wood v. Morehouse*, 45 N. Y. 368; *Briggs v. Waldron*, 83 N. Y. 582, 585; *Brackett v. Griswold*, 103 id. 430; *Brown v. Terry*, 10 J. & S. 1; 2 R. S. [2d ed.] 573; *Rogers v. Jackson*, 19 Wend. 383; Laws on Pres. Ev. 53; Whart. on Ev. §§ 368, 1318; *People v. Pease*, 27 N. Y. 45; *Comm. v. Bradford*, 9 Metc. 268; 1 Greenl. on Ev. § 80; *Beardstown v. Virginus*, 76 Ill. 44.) The amendment by chap. 510, Laws 1875, did not relieve, in all cases, trustees who had theretofore become liable for the penalty from such liability. *Moore v. Mausert*, 49 N. Y. 332, 335; *Ely v. Horton*, 15 id. 595; *Trinity Church v. Vanderbilt*, 98 id. 170; *Vernon v. Palmer*, 16 J. & S. 236; *Halstead v. Dodge*, 19 id. 169, 176; *Williams v. Potter*, 2 Barb. 316; *Palmer v. Conley*, 4 Den. 374; *Bowen v. Losee*, 5 Hill, 221; *Van Rensselaer v. Snyder*, 9 Barb. 302; *Shreveport v. Cote*, 129 U. S. 36.) The General Term erred in reversing the judgment in favor of plaintiff herein. (*Union Bank v. Pratt*, 36 N. Y. 631; Code Civ. Pro., § 522; *Oechs v. Cook*, 3 Duer, 161; *Miller v. White*, 8 Abb. [N. S.] 46; *Rector v. Clark*, 78 N. Y. 21.) The statute of limitations is no defense to this action. (Code Civ. Pro., § 401; *Flash v. Conn*, 109 U. S. 371; *Nat. Bank v. Price*, 33 Md. 487; *Cuykendall v. Corning*, 10 Fed. Rep. 342.) The verdict of the jury upon the questions submitted to them should be held conclusive upon the defendant. (Baylies on N. T. & App. 343, 344; *Cheney v. R. R. Co.*, 16 Hun, 415; *Morss v. Sherrill*, 63 Barb. 21; *Comrs. v. Backus*, 29 How. 33; *Holman v. Dord*, 12 Barb. 336.) None of the

Statement of case.

defendant's exceptions to the admission of testimony were well taken. (*Crooke v. Mali*, 11 Barb. 205; *Walter v. James*, 11 Wkly. Dig. 508; *Pepper v. Haight*, 20 Barb. 429; *Snell v. Snell*, 3 Abb. Pr. 430; *Jackson v. Smith*, 16 id. 201; *Smith v. Floyd*, 18 Barb. 522; *Edington v. M. L. Ins. Co.*, 5 Hun, 178; *Clark v. Bruce*, 12 id. 272; *Levin v. Russell*, 42 N. Y. 251; *Ward v. Kilpatrick*, 85 id. 413; *Mead v. Shea*, 92 id. 122; *Briggs v. Wheeler*, 16 Hun, 583; *S. P. Co. v. Monheimer*, 9 J. & S. 184; *Bragne v. Lord*, Id. 193; *Sutherland v. N. Y. C. & H. R. R. Co.*, Id. 17; *Milliner v. Lucas*, 3 Hun, 496; *Erwin v. N. S. Co.*, 8 Wkly. Dig. 382.) The exception to the denial of the motion to dismiss the complaint and the exception to the refusals to charge, and submit certain questions to the jury were not well taken. (*Cummings v. Webster*, 43 Me. 192; *Herrick v. Hoppock*, 15 N. Y. 409.) The order of revivor was properly made, and any motion to dismiss this appeal to the Court of Appeals on the ground that the right to thus appeal did not survive the death of plaintiff's testator, or for any other reason, should be denied. (*Brackett v. Griswold*, 103 N. Y. 425; *Blake v. Griswold*, 104 id. 613; *Wood v. Phillips*, 11 Abb. Pr. [N. S.] 1; *Gardner v. Barney*, 24 How. Pr. 467; 4 Abb. [N. S.] 251; *Hinckley v. Kreitz*, 58 N. Y. 583; Code Civ. Pro., §§ 1294, 1296, 1298.)

Thomas G. Shearman for respondent. This court has been constantly growing more emphatic in its characterization of an action against a trustee, under section 12, of the act of 1848, as highly penal. (*Garrison v. Howe*, 17 N. Y. 458; *W. A. Co. v. Barlow*, 63 id. 62; *Wiles v. Suydam*, 64 id. 173; *Knox v. Baldwin*, 80 id. 610; *Bruce v. Platt*, 80 id. 379; *Gadsden v. Woodward*, 103 id. 242; *Whitaker v. Masterson*, 106 id. 280; *Miller v. White*, 50 id. 137; *Dabney v. Stevens*, 10 Abb. [N. S.] 39; *Van Amburgh v. Baker*, 81 N. Y. 46; *P. & Co. v. Hotchkiss*, 82 id. 471; *Reed v. Keese*, 5 J. & S. 269; 60 N. Y. 616; *Deming v. Puleston*, 2 Robt. 309; 55 N. Y. 655; *Cameron v. Seaman* 69 id. 398; *S. & Co. Q. Co.*

Statement of case.

v. *Bliss*, 29 id. 297.) There is nothing in the claim of this plaintiff to commend it to the favor of the court. On the contrary, it ought to be treated with disfavor and suspicion. *Carr v. Risher*, 20 Abb. [N. C.] 176; *Brown v. Smith*, 13 Hun, 408; 80 N. Y. 650; *Pugh v. Hurtt*, 52 How. Pr. 22.) The company had no power to issue these bonds. (Laws of 1864, chap. 517; Laws of 1871, chap. 481.) Even if the company had power to issue these bonds, the plaintiff did not prove that they were ever issued or authorized by the company. (*D'Arcy v. T. &c., R. Co.*, 4 H. & C. 463; *W. A. Co. v. Barlow*, 68 N. Y. 34; *L., etc., Ins. Co. v. M. F. Ins. Co.*, 7 Wend. 31; *Adriance v. Roome*, 52 Barb. 399; *Dabney v. Stevens*, 10 Abb. [N. S.] 39, 45; *Risley v. I., etc., R. R. Co.*, 1 Hun, 202; *DeBost v. A. P. Co.*, 35 id. 386; *McCullough v. Moss*, 5 Den. 567; *W. R. R. Co. v. Bayne*, 11 Hun, 166; 75 N. Y. 1; *Alexander v. Cauldwell*, 83 id. 480.) The trial judge erred in charging the jury, that the seal of the corporation to the bonds in suit had been proved, and in refusing to submit that question to them, as he did, in effect, by telling them that the only question of fact to be submitted to them was whether Mr. Risher was president of the company at the time when the bonds were made; and the defendant's exception to these portions of the charge were well taken. (*Jackson v. Pratt*, 10 Johns. 381; *Mann v. Pentz*, 2 Sandf. Ch. 257; *Den v. Vreelandt*, 7 N. J. Law, 352; *Moises v. Thompson*, 8 T. R. 303; *F., etc., T. Co. v. McCullough*, 25 Penn. St. 303; *Leazure v. Hillegas*, 7 S. & R., 313; *Foster v. Shaw*, Id. 156.) In addition to establishing the existence of the debt in 1867, the plaintiff was bound to show that the annual report for that year was not filed. (*M. L. Ins. Co. v. Dake*, 87 N. Y. 257; *W. A. Co. v. Barlow*, 68 id. 34; *Chase v. Lord*, 77 id. 1.) It was an indispensable part of the plaintiff's case that he should prove affirmatively that the defendant was a trustee in the month of January, 1867, when he claims that the annual report was not filed. (*W. A. Co. v. Barlow*, 68 N. Y. 34; *Bruce v. Platt*, 80 id. 379; *Van Amburgh v. Baker*, 81 id. 46; *P., etc., Co. v. Hotchkiss*, 82 id. 471; *Reed*

Statement of case.

v. *Keese*, 60 id. 616; *Deming v. Pulestin*, 55 id. 655; *Boughton v. Otis*, 21 id. 261.) The bonds in suit did not fall within the class of debts for which trustees were made liable by the statute. (*Nimmons v. Hennion*, 2 Sweeney, 633; *Oviatt v. Hughes*, 41 Barb. 541; *Jones v. Barlow*, 62 N. Y. 203; *Duckworth v. Roach*, 81 id. 49; *Haight v. Naylor* 5 Daly 219; *Vincent v. Sands*, 1 J. & S. 511; *Victory Webb Co. v. Beecher*, 26 Hun, 48; *S. P. T. Church v. Vanderbilt*, 98 N. Y. 170.) The section of the statute upon which the plaintiff's cause of action depended was repealed in 1875; and as no rights were reserved by the repealing act, except in actions then pending, his claim for this penalty fell with it. (*V. W. Co. v. Beecher*, 26 Hun, 48; 97 N. Y. 651; *Knox v. Baldwin*, 80 id. 610; *McMaster v. State*, 103 N. Y. 547, 551; *United States v. Heath*, 3 Cranch. 399; *Sanford v. Bennett*, 24 N. Y. 20; *Hackley v. Sprague*, 10 Wend. 113; *Dash v. Van Kleeck*, 7 Johns. 477; *Bonnell v. Griswold*, 80 N. Y. 128; *S. P. M. Bk. v. Bliss*, 35 id. 412; *W. A. Co. v. Barlow*, 63 id. 62; 68 id. 34; *Wiles v. Suydam*, 64 id. 173; *Easterly v. Barber*, 65 id. 252; *Ely v. Holton*, 15 id. 595; *Moore v. Mausert*, 49 id. 332.) If there was evidence tracing these bonds through the hands of trustees of the company, and the plaintiff acquired them without paying value, he had no better title than these trustees had, and they, being themselves in default, as much as the defendant, could not recover against him, and, therefore, the plaintiff could not. (*Knox v. Baldwin*, 80 N. Y. 610; *Easterly v. Barber*, 65 id. 252.) It was palpable error to instruct the jury that they could not bring in a verdict for a smaller amount than \$24,970, the principal of the eleven bonds, with interest from October, 1868. (*Stokes v. Stickney*, 96 N. Y. 323, 326; *Brackett v. Griswold*, 103 id. 425, 427; *Wehle v. Hariland*, 42 How. Pr. 399, 410; *Black v. C., etc., R. Co.*, 45 Barb. 40, 43; *Richmond v. Bronson*, 5 Den. 55; *Lakeman v. Grinnell*, 5 Bosw. 625; *Thomas v. Wied*, 14 Johns. 355; *Hutchinson v. Brand*, 6 How. Pr. 73, 77; *Renick v. Orser*, 4 Bosw. 384, 390; *Littlefield v. Brown*, 1 Wend. 398, 401.) No special motion to dismiss the appeal is neces-

Opinion of the Court, per EARL, J.

sary. (Code Civ. Pro. § 1289.) An action like this, for a penalty against a trustee of a manufacturing corporation, is one *ex delicto* and abates with the death of either party. (*Stokes v. Stickney*, 96 N. Y. 323; *Brackett v. Griswold*, 103 id. 425; *Blake v. Griswold*, 104 id. 613, 617.) The judgment having been reversed and the verdict set aside, the action stood just as if there never had been any judgment or verdict; and, the defendant having died after the reversal, no right of property remained in the plaintiff or his successors. (*Holsman v. St. John*, 90 N. Y. 461, 463; *Evans v. Cleveland*, 71 id. 461, 486, 488; *Thayer v. Bond*, 3 Mass. 296; *Ireland v. Champney*, 4 Taunt. 884; *Woodcock v. Bennett*, 1 Cow. 735; *People v. Clarke*, 10 Barb. 120, 143; *Benjamin v. Smith*, 17 Wend. 208; *Kelsey v. Jewett*, 34 Hun, 11; *Pessini v. Wilkins*, 22 J. & S. 146; *Smith v. Lynch*, 12 Civ. Pro. Rep. 348; *Wood v. Phillips*, 11 Abb. [N. S.] 1; Code of Pro. § 121; Code Civ. Pro. §§ 764, 3343.) The mere fact that the action was revived in the name of the plaintiff's executor does not prevent the court from inquiring whether such revival was warranted. (*Arthur v. Griswold*, 2 Hun, 606; 60 N. Y. 143; *Belmont v. E. R. Co.*, 52 Barb. 637; *Riggs v. Pursell*, 24 N. Y. 370, 378.)

EARL, J. This action was commenced in the fall of 1886, by John F. Carr against John C. Rischer. It was tried at a circuit in January, 1888, and a verdict was rendered for the plaintiff, upon which a judgment was entered in his favor February 1, 1888, for \$25,399.75. Thereafter the defendant appealed from the judgment to the General Term where it was reversed and a new trial was granted, the formal order of reversal being entered December 6, 1888. On the next day, December seventh, the plaintiff died; and thereafter the present plaintiff, as his executrix, made application to the court for an order reviving the action and substituting her as plaintiff, and the order was granted. She then on the same day served notice of appeal to this court and within a few days thereafter the defendant died.

Opinion of the Court, per EARL, J.

The representatives of the defendant now move to dismiss the appeal on the ground that the action by the death of the parties has absolutely abated and that the appeal cannot be further prosecuted.

The action was brought to recover the amount of a claim against a manufacturing company organized under the General Manufacturing Act of 1848 on the ground of the failure of Risher as a trustee of the company to make and file its annual report as required by the act. This is, therefore, a penal action properly characterized as *ex delicto*, and if either party had died at any time before verdict it would have absolutely abated. (*Stokes v. Stickney*, 96 N. Y. 323; *Brackett v. Griswold*, 103 id. 425; *Blake v. Griswold*, 104 id. 613.)

But the action went to judgment before the death of either party. The original wrong was merged in the judgment, and that then became property with all the attributes of a judgment in an action *ex contractu*. Since the rendition of the judgment the controversy between the parties has been over the judgment, not over the original wrong. After the reversal of the judgment there could never be a new trial because there was no one living legally bound to respond for the wrong, or who could legally ask for its redress. The reversal of the judgment did not for every purpose strike it out of existence as if it had never had being. It still had a potential existence. The reversal was not final. The law gave opportunity by appeal for its restoration, and thus the controversy over the judgment as property could be continued. The plaintiff by the appeal seeks to fasten upon the representatives of the deceased defendant, not responsibility for the original wrong, but for the judgment, and she seeks not to recover damages for the wrong, but to enforce and realize upon the judgment as an asset of the estate which she represents.

We, therefore, perceive no reason to doubt that the present controversy may continue without violating any rule of law, and for this conclusion we may invoke the principle laid down in *Wood v. Phillips* (11 Abb. [N. S.] 1), as sufficient authority.

Opinion of the Court, per EARL, J.

That was an action for assault and battery. The plaintiff recovered a verdict and the General Term set it aside and ordered a new trial, and then the plaintiff died. Afterward his administratrix appealed to this court from the order granting the new trial. It was claimed there as here that the action had abated. But RAPALLO, J., writing the opinion of the court said: "A claim for damages for a purely personal injury, while it remains unliquidated and unascertained by a verdict, dies with the person. But the intent of the section (121) above cited seems to be to prevent this result, after the claim has been ascertained by a verdict. In that case the verdict becomes property which passes to the representatives of the deceased, as a judgment would at common law. It becomes a duty of the executor or administrator to defend it for the benefit of the estate. If set aside after the death of the party there seems to be no reason why the representative should not be entitled to prosecute such appeal as the law allows for the purpose of having it restored. He is not in such a case prosecuting an action for the original tort, but is endeavoring to save and sustain the verdict. So long as the right to review the action of the court in setting aside a verdict continues, it cannot be said that the verdict is absolutely annihilated, for it is still capable of being restored to life." It is said that that decision was made when section 121 of the Code of Procedure was in force, which contained this language: "After a verdict shall be rendered in an action for a wrong, such action shall not abate by death of any party; but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law;" and it is claimed that as this is not an action for a personal injury, the plaintiff can have no benefit from section 764 of the present Code, which is the amended substitute for the language above quoted. It was the purpose of the provisions contained in both sections to save certain actions from abatement after verdict and before judgment, and to regulate proceedings upon the verdict in such actions. In *Stringham v. Hilton* (111 N. Y. 188), after we had reversed the judgment for the plaintiff, we held that, notwithstanding section 121, the

Statement of case.

plaintiff could not have a new trial, the defendant having died. A case like this, where judgment has been entered and the controversy is over that, is certainly not within the scope of either section, and its disposition must depend upon the general principles of law above alluded to.

The legal representatives of Rischer should, therefore, be substituted in his place, otherwise we must take action under section 1298 of the Code. Our present duty is simply to deny the motion.

All concur.

Motion denied.

THE PEOPLE ex rel. WILLIAM H. McGRATH, Appellants, v.
THE BOARD OF SUPERVISORS OF THE COUNTY OF WEST-
CHESTER, Respondent.

A constable or sheriff in executing a certificate of a judgment of conviction issued to him as prescribed by the Code of Criminal Procedure (§§ 721, 725) is engaged in a criminal proceeding withing the meaning of the act, "to reduce the number of town officers and town and county expenses," etc. (Chap. 180, Laws of 1845, as amended by chap. 455, Laws of 1847), and the fees and expenses of the officer are included in the provisions of said act (§ 26, as amended), charging the expenses of certain criminal proceedings under the grade of felony upon the town or city where the offense was committed.

Accordingly, *held*, that the account of a constable for fees and expenses in conveying to a penitentiary prisoners convicted and sentenced in the Court of Special Sessions of his town were a town and not a county charge, and so that a refusal of the board of supervisors of the county to audit it as a county charge was proper.

People ex rel. v. Supervisors (67 N. Y. 330), distinguished.

Reported below, 53 Hun, 157.

(Argued January 13, 1890 ; decided January 21, 1890.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made June 28, 1889, which reversed an order of Special Term, granting a peremptory writ of *mandamus*, the substance of which and the material facts are set forth in the opinion.

Opinion of the Court, per FINCH, J.

Joseph F. Daly for appellant. Charges for services and expenses in conveying criminals to jail are county charges. (*People ex rel. v. Super.*, 18 Hun, 19; 1 R. S., chap. 12, p. 978, § 3.) The provision of the Revised Statutes cited has not been repealed either expressly or by implication. (2 R. S. 1078; Laws of 1847, chap. 455, § 25; *People ex rel. v. Super.*, 67 N. Y. 330; *Ross v. Super.*, 38 Hun, 20; *Mark v. State*, 97 N. Y. 572, 578; Laws of 1876, chap. 108, § 3.) If the General Term is correct in the decision of the case at bar, as far as the city of Yonkers is concerned, the Legislature has created the anomaly of saying that in Yonkers, if a member of the police force should convey a prisoner to the county jail, the charge for such conveyance should be a county charge; while, if a constable performs the same service, the charge shall be a town charge. (Laws of 1881, chap. 184, § 10.)

William J. Robertson for respondent. Under the Revised Statutes this claim would have been a county charge, but chapter 180, section 26 of the Laws of 1845, as amended by chapter 455 of the Laws of 1847, makes this claim a town charge against the town where the offense was committed, and to that extent modified and repealed the Revised Statutes in reference to such charges. (Laws of 1845, chap. 180, § 26; Laws of 1847, chap. 455; *People ex rel. v. Supervisors*, 4 Denio, 260.)

FINCH, J. The relator presented a claim to the board of supervisors of Westchester county for fees and expenses which accrued to him as a constable for the conveyance of prisoners to the Albany penitentiary who had been convicted and sentenced in the Court of Special Sessions in the city and town of Yonkers. The claim was disallowed and its audit refused upon the ground that it was a town and not a county charge. The relator thereupon applied for a peremptory *mandamus* requiring the audit of his claim by the county board, which was awarded; but on appeal to the General Term the action of the

Opinion of the Court, per FINCH, J.

supervisors was approved and the relator's claim adjudged to be a charge only against the town.

The Revised Statutes enumerated among county charges "the compensation allowed by law to constables for attending courts of record, and reasonable compensation to constables and other officers for executing process on persons charged with criminal offenses, for services and expenses in conveying criminals to jail." (2 R. S. [8th ed.] 1078.) By this provision the fees of town and county officers in criminal cases were alike chargeable to the county, and irrespective of the grade of the offense, the court which exercised its jurisdiction, or the locality of the criminal act. But in 1845, an act was passed (chap. 180) entitled "An act to reduce the number of town officers and town and county expenses, and to prevent abuses in auditing town and county accounts," which evidently was intended to make an equitable division of criminal expenses as between the towns and county, and for that purpose took into view the locality and grade of the crime. By section 26 it was enacted that "all fees and accounts of magistrates and other officers for criminal proceedings shall be paid by the several towns or cities wherein the offense shall have been committed; and all accounts rendered for such proceedings shall state where such offense was committed, and the board of supervisors shall assess such fees and accounts upon the several towns or cities designated by such accounts." So far the section distributed nothing, but charged all fees in criminal proceedings upon the town or city in which the offense was committed. An exception, however, followed in these words: "But nothing herein contained shall apply to cases of felonies or where the proceedings or trial for the offense shall be had before any court of Oyer and Terminer or General Sessions of the Peace; and the fines imposed and collected in any such cases shall be credited to said towns or cities respectively." The effect and purpose of these provisions was obvious. The fees in the criminal proceedings, which had been a county charge, were distributed between the county and the towns upon principles which were supposed to be equitable, and to

Opinion of the Court, per FINCH, J.

obviate an existing abuse. The expense in proceedings in felonies, and where the proceedings or trial were had before the Oyer and Terminer or General Sessions remained unchanged and continued to be a county charge, but the fees for all other proceedings of every kind became a charge upon the town or city in which the offense was committed. That was decided very soon after the passage of the act in *People ex rel. v. Supervisors of Ontario* (4 Denio, 260), and a *mandamus* issued in accordance with such construction. The minor offenses of which the local court of the town or city had jurisdiction, and which were committed in such town or city originated a charge against the locality, to balance which in some measure all the fines imposed were diverted to the town or city burdened with the expenses, while the graver offenses which were felonies or redressed in the Oyer and Terminer or General Sessions brought a charge upon the county.

The act of 1845 was amended in 1847. (Chap. 445.) That amendment struck out the words "provided the proceedings shall be had within the county in which such offense shall have been committed," and added a new provision further modifying the distribution of criminal expenses. That provision is that "when any person shall be bound over to the Oyer and Terminer or court of Sessions, or committed to jail to await a trial in either of said courts, the costs of the proceedings had before the single magistrate shall be chargeable upon the towns or cities as aforesaid, and the costs of the proceedings had after the person shall have been so bound over or committed shall be chargeable to the county." The purpose to make the expenses follow the jurisdiction and the locality of the offense is thus made very manifest. The proceedings in the local court and before the town magistrate are a burden upon the town until the case passes to the broader jurisdiction of the Oyer and Terminer or General Sessions; and where it never does so pass but remains until the end in the Special Sessions the whole expense of the entire criminal proceeding is put upon the town.

The courts of Special Sessions of the peace had an origin

Opinion of the Court, per FINCH, J.

back of the Revised Statutes, but are not and never have been courts of record. (*People v. Kennedy*, 2 Park Cr. Rep. 319 ; Code of Civ. Pro. § 3.) They have jurisdiction to try many minor offenses, described as misdemeanors committed within the county (Code of Crim. Proc. § 56), and such other jurisdiction as is now provided by special statute or municipal ordinance authorized by statute. And so, in cities and villages a very large portion of the criminal business transacted before them consists in the enforcement of municipal ordinances, and the preservation of the local peace. It was not, therefore, an unjust or unreasonable discrimination which left the expenses of a trial and conviction in the Special Sessions wholly upon the town, as also the preliminary expenses in graver cases in which bail is given for the Oyer and Terminer and Sessions ; and the discrimination itself is clearly and effectively established.

But the appellant insists, and it is the entire scope of its learned counsel's argument, that taking a prisoner to jail is not a criminal proceeding within the meaning of this statute, and cites as authority the case of *People ex rel. Van Tassal v. Supervisors of Columbia Co.* (67 N. Y. 330). The controversy there arose over the bill of the sheriff for the board of prisoners confined in the jail, and what the court held was that the act did not embrace the fees of the sheriff as jailer, saying that "the execution of a sentence of imprisonment cannot be regarded a criminal proceeding within the meaning of the act." It is quite possible to say that a criminal proceeding ends when punishment begins ; and that keeping persons under sentence in jail and furnishing their food is not in any just sense a continuance of the criminal proceeding which ended when the imprisonment began ; but that is very far from justifying a ruling that the act of the constable who, upon receiving a certificate of the judgment of conviction with directions to execute it (Code Crim. Pro. §§ 721, 725), by force of that warrant conveys the prisoner to the jail or penitentiary and delivers him over for punishment is not engaged in a criminal proceeding. It is utterly impossible for us to say that. Indeed, the provision of the Revised Statutes upon

Statement of case.

which the appellant relies as specifying what are county charges, after enumerating among them "for services and expenses in conveying criminals to jail" adds "and for *other* services in relation to criminal proceedings for which no specific compensation is prescribed by law." The act implies, what I think cannot be otherwise, that conveying a criminal to jail is one service in a criminal proceeding, of which there are also others. Certainly it would be very inconsistent to say that a constable who arrests a suspected person by force of a warrant directing such arrest renders a service in a criminal proceeding, while the same constable who executes another warrant requiring him to commit the same person to the jail or penitentiary is not acting in a criminal proceeding. That his fees in the latter case are to be fixed by the board of supervisors does not alter the character of the service or change the ultimate liability.

This construction of the statute was that adopted by the General Term, and seems to be inevitable. The order of the General Term should, therefore, be affirmed with costs.

All concur except EARL, J., absent.

Order affirmed.

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121	000

ELSIE R. FEITNER, Respondent, v. RICHARD J. LEWIS et al.,
Appellants.

Plaintiff in 1836 joined with her husband in a mortgage upon his land. In 1838 they were both made parties to a suit for the foreclosure of the mortgage. No copy of the writ of subpœna was served upon her; one was served upon the husband, and one delivered to him with the request to hand it to her; she was at the time under age. A judgment of foreclosure and sale was entered, under which the premises were sold. The husband died in 1882. In an action to recover dower, *held*, that under the rule and practice in chancery proceedings in force at the time of the foreclosure, personal service of the writ upon plaintiff was not necessary, but service on the husband was a good service on both, and this was so although she was at the time under age; and that, therefore, the action was not maintainable.

Feitner v. Lewis (23 J. & S. 519), reversed.

(Argued December 20, 1889; decided January 14, 1890.)

Statement of case.

APPEAL from order of the General Term of the Superior Court of the city of New York, entered upon an order made May 7, 1888, which overruled defendant's exceptions, denied a motion for a new trial and directed judgment in favor of plaintiff on a verdict.

This action was brought to recover dower.

The plaintiff in 1836 joined with her husband in executing a mortgage upon his land. In 1838 a suit for the foreclosure of the mortgage was instituted, in which the husband and wife were made parties defendant. A copy of the writ of subpoena was served upon him, and a copy was delivered to him with the request that he would hand it to her. Judgment of foreclosure and sale was entered by default and the property was sold thereunder. The husband died in 1882. This action was brought by plaintiff in 1887. The mortgaged premises had, through mesne conveyances since the acquisition of title under the foreclosure, become the property of the defendants.

It was proved that at the time of her marriage the plaintiff was an infant, and that her infancy continued to a date subsequent to the sale in foreclosure. The trial judge declined to dismiss the complaint, and submitted to the jury the question of the plaintiff's age, and a verdict was rendered for the plaintiff. The trial judge ordered the exceptions to be heard in the first instance at General Term. It was held there that the failure to serve the wife personally was fatal to the proceedings, and the judgment against her was void.

Thomas J. Rush for appellant. The order of the General Term denying the defendant's motion for a new trial is reviewable in this court. (*Walker v. Spencer*, 86 N. Y. 162; *Raynor v. Raynor*, 94 id. 248; *Wahl v. Barnum*, 26 N. Y. S. R. 457.) Some sanctity should be given to judicial proceedings, some time limited beyond which they should not be questioned, some protection afforded to those who purchased at sales by judicial process, and some definite rule be established by which property thus acquired may become transmissible with security to the possessors. (*Voorhees v. Jackson*, 10 Pet.

Statement of case.

449; *Quin v. Wetherbee*, 41 Cal. 427.) The Court of Chancery had jurisdiction of the subject-matter, and of the parties in the action of *Purdy v. Feitner*, foreclosing the mortgage. (Thomas on Mort. 265; Daniels on Eq. Pr. 444; Barb. Ch. Pr. 50; *Ferguson v. Smith*, 2 John. Ch. 139; *Leavit v. Cruger*, 1 Paige, 421; *Eckerson v. Vollmer*, 11 How. Pr. 42; *Kent v. Jacobs*, 5 Beav. 48; Selon on Pr. 91; Burton on Pr. 109; Harrison's Ch. 162; *Footte v. Lathrop*, 53 Barb. 183.) To enable Mrs. Feitner to successfully overcome the effect of the judgment in the suit in chancery, the judgment must be treated as absolutely void. (Freeman on Judg. § 125; *Hunter v. Lester*, 18 How. Pr. 347; *Myers v. Overton*, 2 Abb. Pr. 344; *Myers v. Wilson*, 1 Hilt. 259; *Allen v. Huntington*, 16 Am. Dec. 702; *Whitaker v. Merrill*, 28 Barb. 526; *Brickhouse v. Sutton*, 6 Am. St. 497; *Scherr v. Le Grange*, 42 N. W. Rep. 616.) The decree in the foreclosure against Elsie R. Feitner, treating her as an adult and without the formality of appointing a guardian, may have been irregular, but was not void. (*Croghan v. Livingston*, 17 N. Y. 220; *Austin v. Charleston*, 8 Metc. 196; *Perkins v. Fairfield*, 11 Mass. 227; *Kemp v. Cook*, 18 Md. 130; *Thompson v. Tomlie*, 2 Pet. 163; *Voorhees v. Jackson*, 10 id. 449; *Doe v. Bradley*, 6 S. & M. 485; *McPherson v. Cauetiff*, 11 S. & R. 429; *McMurray v. McMurray*, 66 N. Y. 175; Freeman on Judg. § 510; *Newbold v. Schleus*, 10 East. Rep. 698.) Prompt action to repudiate the transaction was necessary. (*Howard v. Dusenbury*, 44 How. Pr. 423; Story's Eq. Juris. §§ 64, 1520.) Assuming that plaintiff's rights were not cut off by the decree, her remedy was an action to redeem, which could have been brought by her during the life of her husband. (*Taggart v. Wade*, 17 N. Y. S. R. 646.) The Court of Chancery having jurisdiction of the subject-matter, and the parties in the foreclosure suit of *Purdy v. Feitner*, the decree of the court is final as to every matter therein determined. (*LeGuen v. Gouveneur*, 1 John. Cas. 392; *Jackson v. Hoffman*, 9 Cow. 271; *Lansing v. Goelet*, 9 id. 362; *Talbot v. Todd*, 5 Dana, 193; *Peck v. Wood-*

Statement of case.

bridge, 3 Day, 30; *Knott v. Taylor*, 6 Am. St. 547; *Freeman on Judgt.* § 150; *Olmsted v. Hoyt*, 4 Day, 436; *Green v. Branton*, 1 Dev. Eq. 500; *Embury v. Connor*, 3 N. Y. 522; *Clemens v. Clemens*, 37 N. Y. 74; *Dunham v. Bower*, 77 id. 76; *Pray v. Hegeman*, 98 id. 351; *Bell v. Merrifield*, 109 id. 202; *Goebel v. Iffla*, 111 id. 170; *Beveredge v. N. Y. E. R. R. Co.*, 112 id. 19; *Jordan v. Van Epps*, 85 id. 427; *Moeschler v. Lochte*, 12 N. Y. S. R. 855; *Reed v. Reed*, 107 N. Y. 545; *Hall v. Law*, 102 U. S. 461; *Gaylord v. City of Lafayette*, 17 N. E. Rep. 899; *Bloomer v. Sturgis*, 58 N. Y. 168; *Clinton v. Seymour*, 4 Ves. 440.) A judgment or decree upon default is as conclusive as one upon the merits. (*Powers v. Witty*, 4 Daly, 552; *Newton v. Hook*, 48 N. Y. 676; *Blair v. Bartlett*, 75 id. 150; *Ogilvie v. Herne*, 13 Ves. 564.) The proceeding in foreclosure of a mortgage is one *in rem*; the mortgage was merged in the judgment and is no longer open to attack. (*Hartman v. Ogborn*, 54 Penn. St. 120; *Michaelis v. Brawley*, 109 id. 7.) The provision of the Revised Statutes protecting dower rights is not applicable. (3 R. S. [7th ed.] §§ 16, 2198; *Hoffman v. N. W. M. L. Ins. Co.*, 37 A. L. J. 141; *Jordan v. Van Epps*, 85 N. Y. 436.) The learned General Term erred in treating the foreclosure suit as one in which there had been no service upon Mrs. Feitner. (*Feitner v. Hoeger*, 15 N. Y. S. R. 377.)

Isaac N. Miller for respondent. The mortgage in evidence, was, as to this plaintiff, absolutely void. (Tyler on I. & C. chap. 2, p. 48, 555; *Saniderson v. Marr*, 1 Lev. 86-87; *Darby v. Boucher*, 1 Salk. 279; *Baylis v. Dinsley*, 3 M. & S. 447-448; *Luther v. Fish*, 4 Lans. 213; *Chapin v. Shafer*, 49 N. Y. 412; Comyn's Dig. 2; Story on Cont. [4th ed.] § 57; *Sherman v. Garfield*, 1 Den. 330; *Sanford v. McClean*, 3 Paige, 121; *Priest v. Cummings*, 16 Wend. 617.) The foreclosure proceedings constituted no defense to this action. (1 Hoffman's Ch. 106; *Ingersoll v. Mangan*, 84 N. Y. 622; *Grant v. Van Schoonhoven*, 9 Paige, 255; *Bosworth v. Vandewalker*, 53 N. Y. 597; *Walter v. DeGraf*, 19 Abb. [N. C.] 406; *People*

Opinion of the Court, per GRAY, J.

v. *Hoffman*, 7 Wend. 489; *Knickerbocker v. DeFreest*, 2 Paige, 306; 2 R. S. 447, §§ 10, 11; Code Civ Pro. §§ 426, 427; *Wilkinson v. Parish*, 3 Paige, 655; *Bloom v. Burdict*, 1 Hill, 139; *Kohler v. Kohler*, 2 Edw. Ch. 69; *Howey v. Large*, 51 Barb. 222; *Fairweather v. Satterlee*, 7 Rob. 546; *Kellog v. Klock*, 2 Code Rep. 28; *Lathers v. Fish*, 4 Lans. 213; *Mockey v. Gray*, 2 John. 192; *Bliss v. Rice*, 9 id. 159; *Boyley v. McAvoy*, 29 How. 278; *Park v. Park*, 19 Abb. 161; *Mills v. Dennis*, 3 Johns. Ch. 367; *Wright v. Miller*, 1 Sandf. Ch. 103; *Coning v. Smith*, 2 Seld. 82; *Lewis v. Smith*, 9 N. Y. 502; *Frost v. Koon*, 30 id. 448, 449; *E. I. S. Bank v. Goldman*, 75 id. 131; *Lawrence v. Smith*, 2 N. Y. 255.) The judgment of foreclosure was not a bar to this action. (*Ferguson v. Crawford*, 70 N. Y. 253, 263; *William v. Van Valkenberg*, 16 How. Pr. 146; *Starbuck v. Murray*, 5 Wend. 148, 158; *Bosworth v. Vandwalker*, 53 N. Y. 597; *Williams v. Schack*, 105 id. 332; *Sherman v. Garfield*, 1 Den. 330; *Maloney v. Horan*, 49 N. Y. 111; *Perry v. Dickerson*, 85 N. Y. 352; *Dempsey v. Tyler*, 3 Duer. 100; *Master v. Olcott*, 101 N. Y. 160; *W. C. Co. v. Hathaway*, 8 Wend. 484; *Brown v. McCune* 5 Sandf. 224; 2 Phil. on Ev. 9; *Rathbone v. Hooney*, 58 N. Y. 467.) Plaintiff is not guilty of laches, nor is she in default for not having raised the question as to her rights heretofore. (Code Civ. Pro. § 1596; *Wells v. Seiras*, 24 Fed. Rep. 82; 1 Hoffman's Pr. 161; 2 R. S. [6th ed.] 1122, § 16; *Alword v. Beach*, 5 Abb. Pr. 452; *Lewis v. Everhardt*, 102 U. S. 300.)

GRAY, J. I think the appellants should prevail. The court below fell into the error of supposing that under the rules and practice in chancery proceedings, a personal service of the writ of subpcena upon the wife was necessary, although the action did not relate to her separate property. The only interest which the plaintiff had was an inchoate right of dower in the mortgaged land. That arose simply from her status as wife and gave her no separate estate.

Chancellor KENT stated the rule, in *Ferguson v. Smith*

Opinion of the Court, per GRAY, J.

(2 Johns. Ch. 139), to be "that the service of a subpoena against husband and wife on the husband alone is a good service on both; and the reason is that the husband and wife are one person in law and the husband is bound to answer for both. But where the plaintiff is seeking relief out of the separate estate of the wife, it has been deemed necessary in a late case (9 Vesey, 488) that the wife should be served." See, also, *Leavitt v. Cruger* (1 Paige, 422).

This is the exception to the rule, which required personal service upon an infant defendant. The merger of the legal identity of the wife in that of the husband is not affected by the question of her age. The legal unity is not dependent upon the fact of the wife's majority. Therefore, when service was made upon the husband, in accordance with the rule then in force, the court acquired jurisdiction to proceed against both. The theory of the chancery practice was to secure jurisdiction over the person of the infant defendant and it was effected, in all cases except that of an infant wife, by a personal service of the writ. Thereupon, the infant was bound to appear and to have a guardian appointed. In case of his neglect to do so and of no application in his behalf, the court would proceed to make the appointment of itself, or when set in motion by complainant. (Hind's Ch. Pr. tit. Appearance; 1 Barb. Ch. Pr. 127.) But, in the case of an infant wife and where her separate property was not the subject of the proceeding, no guardian was necessary, for the husband was bound to appear for both through his solicitor and to put in a joint answer. If she refused to join in the answer, the husband could show the fact of her refusal and would be permitted to answer separately. Upon this subject I may refer to the cases of *Foxwist v. Tremaine* (2 Saund. 212); *Chambers v. Bull* (1 Anst. 269); *Ferguson v. Smith* (*supra*); and *Leavitt v. Cruger* (*supra*), and to the works on chancery practice. In *Foote v. Lathrop* (53 Barb. 183), a wife sought to avoid a judgment of foreclosure and sale taken against her in 1857, on the ground that she was then confined as insane and was not personally served with process. MARVIN, J., speaking for

Statement of case.

the General Term, in the case, in sustaining the order denying her motion, relied solely on the cases of *Ferguson v. Smith*, *Leavitt v. Cruger* and *Eckerson v. Vollmer* (11 How. Pr. 42).

This action was destitute of merits and lacked support in legal principles and the complaint should have been dismissed.

The order of the General Term denying defendants' motion for a new trial should be reversed, the defendants' exceptions sustained and a new trial ordered, with costs to abide the event.

All concur.

Order reversed, and judgment accordingly.

THE PEOPLE ex rel. WILLIAM DARROW et al. as Trustees, etc.,
Appellants, v. MICHAEL COLEMAN et al. Commissioners, etc.,
Respondents.

The provision of the act of 1888 (Chap. 392, Laws of 1888), declaring that "All debts and obligations for the payment of money due or owing to persons residing within this state * * * wherever said securities shall be held shall be deemed, for the purpose of taxation, personal property within this state, and shall be assessed as such to the owner or owners," refers to debts or obligations which are solely due or owing to residents of this state; it does not include as owners persons who are trustees only, and while under the old law if a trustee residing here has possession of such securities he may be assessed for them as a trustee in possession, even if there be other trustees non-residents, the resident trustee may not be assessed for securities not held by him and not within this state, but which are in the possession of one of the non-resident trustees.

Accordingly, *held*, where two of three co-trustees resided in this state, and the other resided in another state, the beneficiaries also being non-residents, that an assessment of securities in the hands of the non-resident trustee was void.

53 How,
People ex rel. v. Coleman (~~119 N. Y.~~ 482), reversed.

(Argued January 13, 1890; decided January 21, 1890.)

CROSS APPEALS from order of the General Term of the Supreme Court in the first judicial department, made July 9, 1889, which reversed an order of Special Term adjudging

119	137
135	650
119	137
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168	2365

Statement of case.

an assessment upon certain personal property to be void, and reduced the same, and ratified and confirmed the proceedings of the commissioners of taxes and assessment.

The relators brought a *certiorari* under chapter 269 of the Laws of 1880, to review an assessment upon personal estate.

The property assessed consisted of bonds and mortgages and other securities belonging to a trust fund, all of which at the time of the assessment were in the hands of David Belveson who resided in New Jersey, and who was co-trustee with the relators. The beneficiaries of the trust were also non-residents.

S. B. Brownell for appellants. Prior to chapter 392 of Laws of 1883, no tax could have been assessed upon any of the trustees in respect to the mortgages upon property in Illinois and Iowa. (2 R. S. 981, chap. 13, §§ 1, 2; id. 988, chap. 13, §§ 5, 8, 9, 10; *People ex rel. v. Comrs.*, 23 N. Y. 223; Laws of 1851, chap. 37, p. 44, 332; *People ex rel. v. Smith*, 88 N. Y. 571; *People v. Gardner*, 51 Barb. 352; *People ex rel. v. Comrs.*, 4 Hun, 595; 62 N. Y. 630; *Graham v. F. N. Bk.*, 84 id. 393; *Lord v. Arnold*, 18 Barb. 104; *Bourdman v. Super.*, 85 N. Y. 359.) Personal property out of the state belonging to residents is not subject to taxation. (Laws of 1883, chap. 392, p. 568; *People ex rel. v. Smith*, 88 N. Y. 571; *Strauss v. Coleman*, 44 Hun, 20; *People ex rel. v. Comrs.*, 17 id. 293; *People ex rel. v. Coleman*, 42 id. 581; *People v. Comrs.*, 23 N. Y. 224, 232.) The terms executors, trustees and agents are not included under the words "owners or owner." (*People ex rel. v. Coleman*, 44 Hun, 20; *Perry on Trustees*, §§ 411, 412. The assessment is illegal and void because the commissioners had no power to change an assessment first made on the rolls against three trustees into an assessment against two trustees. (*Perry v. Assessors*, 106 N. Y. 671.)

D. J. Dean for defendants. The assessment against the two resident co-trustees was correct in form. (*People ex rel. v.*

Opinion of the Court, per PECKHAM, J.

Coleman, 42 Hun, 581, 583–586.) The trust property was not exempt from taxation for any of the reasons set forth in the petition. (Laws of 1883, chap. 392; *People ex rel. v. Smith*, 88 N. Y. 576; *Kirtland v. Hotchkiss*, 100 U. S. 491; R. S., chap. 13, §§ 1, 3, 5, 9, 10; *Tracy v. Reed*, 38 Fed. Rep. 69; *Baldwin v. Shine*, 84 Ky. 502, 512; *People v. Assessors*, 40 N. Y. 160; *Kirtland v. Hotchkiss*, 100 U. S. 491, 498; Cooley on Tax. [2d. ed.] 516; Perry on Trusts, 307–308, §§ 331, 411.) The commissioners did not err in refusing to deduct the value of one-third of the trust estate on account of the non-residence of one of the co-trustees. (*Neustadt Case*, 42 Hun, 581.)

PECKHAM, J. It is substantially conceded, and it is in any event very plain that, prior to the act chapter 392 of the Laws of 1883, the assessment in question could not be sustained. (*People ex rel. Jefferson v. Smith*, 88 N. Y. 576.) That act provides that “all debts and obligations for the payment of money due or owing to persons residing within this state, however secured, or wherever such securities shall be held, shall be deemed, for the purposes of taxation, personal estate within the state, and shall be assessed as such to the owner or owners thereof in the town, village or ward in which such owner or owners shall reside at the time such assessment shall be made * * * ” This statute was passed the year subsequent to the decision of the case of *People ex rel. Jefferson v. Smith* (*supra*), and the inference is not a labored one, which concludes that the law was enacted to meet that decision. In that case the relator, a resident of the village of Warsaw in this state, was the absolute owner of the securities which the assessors had attempted to reach for the purpose of taxation, but such securities were in the possession of agents residing without the state, and by the laws of the states where the agents resided the securities were liable to be taxed in those states. It was held by this court that the relator was not liable to be assessed for such securities. The idea that personal property follows the *situs* or residence of the owner, while in some

cases a perfectly proper legal fiction to be indulged in for purposes of justice, was held not to apply in such a case for the purpose of imposing a tax upon a security not within the state and not protected by our laws.

The case here presented is one where the persons assessed are not the absolute owners of the property, but are trustees and have only a representative or official interest therein, and but two out of the three are residents within the state, while a third resides in another state and also has the custody and control of the property, and the beneficiaries are also non-residents. Does the act of 1883 meet such a case? We think not. It is not a debt due and owing to persons residing within this state, for it is one which is due or owing to them in connection with another who is a joint owner, and who is not a resident within this state and such other has possession of the securities. The statute means that the debt must be one which is solely due or owing to residents of this state. If the trustee residing here has possession of the securities, he can be assessed for them under the old law as a trustee in possession, even though there be other trustees non-residents. Nor do we think that the statute meant to include as owners, persons who were trustees only, and thus assess them for the property not held by them and not within this state.

Generally a man is not spoken of as the owner of property, who merely holds it as a trustee and in a representative capacity. He has the legal title, and he is to be assessed for it when it is within the state, but this is by express provision of statute, and such provision is not mentioned in the case of a trustee whose trust property is outside of the state and not in his possession.

The contention of the counsel for the tax commissioners would render property liable to double, or even treble, or still greater taxation, if the laws of other states were like ours and there were three or more trustees living in as many different states. The statute as it is may lead to injustice in the double taxation of personal property, once to its absolute owner in this state, and again in the hands of his agents in

Statement of case.

the shape of securities in their custody and control in other states. It is not for courts to widen the possible injustice which may be perpetrated under a statute, by giving it a construction not only not called for by its language, but forced and unnatural under the circumstances. It is unnecessary to go over the argument arising from an examination of the whole law of assessment, for the purpose of showing that the construction adopted by us is the correct one. We think that it plainly appears that the construction adopted by the learned General Term may lead to such a perversion of justice that no court ought to adopt it, unless constrained by the plainest language of the statute. We are of the opinion that such is not the language of this one.

This case is a good illustration of the inequitable consequences arising from the construction of the court below. The real, acting trustee lives in New Jersey. He has possession and control of the securities, which are bonds and mortgages upon lands in other states, and the beneficiaries are all non-residents of this state. And yet, by the action of the tax commissioners, because two of the trustees are residents of this state, although they have neither possession nor control of the property and none of it is in this state, the trust estate must pay tribute to us. We think not.

The order of the General Term should be reversed, and that of the Special Term, setting aside and vacating the assessment, should be affirmed, with costs.

All concur, except EARL, J. absent.

Ordered accordingly.

IN THE MATTER OF THE PETITION OF THE SOUTH BEACH
RAILROAD COMPANY TO ACQUIRE LANDS, ETC.

Under the provision of the General Railroad Act of 1850 (§ 13, chap. 140, Laws of 1850), which authorizes a corporation organized under it to obtain, by condemnation, such lands as is "required for the purposes of its incorporation," only such and so much land may be condemned as the proper execution of the corporate purposes shall require and render necessary.

Statement of case.

Under the provision of the Street Railroad Act of 1884 (§ 8, chap. 252, Laws of 1884), giving to a corporation organized under it the right to a contruct its road "through, along and upon any private property which said company may require for the purpose," and giving it the powers and privileges granted to corporations organized under the General Railroad Act, conceding that a street railroad corporation has power to condemn lands of a private owner in some cases and for some purposes, as to which *quære*, the purposes are those, and those only, which the law of its organization describes and defines, and which are certified to in its articles of association; those purposes are limited to the construction of a street surface railroad.

Where, therefore, the articles of association of a corporation organized under the Street Railroad Act, stated its purpose to be to construct and operate a street surface railroad through certain specified avenues in the village of E., and the corporation subsequently filed a map of its intended route, which was not along the specified streets, but was located upon private property outside of the streets for nearly the whole distance, *held*, the corporation had no right to condemn the lands upon which the proposed route was located, as they were not required for the purposes of its incorporation; that while a right to change the specified route might exist, this did not authorize a change which involved not only a contradiction and violation of the articles of association, but also of the character and quality of the corporation.

Reported below, 53 Hun, 131.

(Submitted January 13, 1890; decided January 21, 1890.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made the second Monday of May, 1889, which affirmed an order of Special Term denying the application of the petition for the appointment of commissioners to appraise the compensation for lands sought to be taken by the petitioner.

The facts, so far as material, are stated in the opinion.

Daniel G. Thomson for appellants. It is a forced construction of the word "acquire" to limit it to acquisition by gift or voluntary purchase. (Laws of 1850, § 13.) The section of the Constitution relied on as the chief point in opposition to this application has been amply construed by the Court of Appeals and the Supreme Court, and in such a way as to deprive the objection made in the present case of all its force. (*People v. Learned*, 5 Hun, 626; *People v. Hoyt*, 7 id. 39;

Statement of case.

People v. Banks, 67 N. Y. 569; *In re R. W. Works*, 2 Wkly. Dig. 416; *In re N. F. Co.*, 98 N. Y. 139-157; *People v. Squire*, 107 id. 593.) If the authority to condemn land is constitutionally vested in a street surface railroad company, the manner in which such right is to be exercised must be that provided in the General Railroad Act, except as modified by the Street Railroad Act. (Laws of 1884, chap. 252.) No filing of a general map of location was in the present case required by law. (*C. I. & B. R. R. Co.*, 12 Hun, 451; *Mason v. B. C. & N. R. R. Co.*, 35 Barb. 380; Laws of 1884, chap. 252, § 3.) If a map of location was necessary, the map filed January 19, 1889, was fully sufficient. (*Mason v. B. C. & N. R. R. Co.*, 35 Barb. 364; *Hunt v. Smith*, 9 Kan. 137.) It is possible to consider the map as a supplement to and a part of the original location, or as a change of route. If the former theory be the correct one, the map, though unnecessary, is yet an ample notice to the party whose lands are to be taken, and afforded full opportunity to object in any legal way. By her failure to apply to the Supreme Court for the appointment of commissioners the respondent waived her right of objection to a location through her premises. (*In re N. Y. & B. R. R. Co.*, 62 Barb. 85; *In re L. I. R. R. Co.*, 45 N. Y. 364; *In re C. R. R. Co.*, 1 T. & C. 421; *N. Y. & A. R. R. Co. v. N. Y., W. S. & B. R. R. Co.*, 11 Abb. [N. C.] 386; *In re R. H. & L. R. R. Co.*, 110 N. Y. 128.) Even if the location through Mrs. Byrnes' land be considered a change of route, it is good and sufficient. (Waterman on Corp. 365, 366; *Palmer v. Gates*, 3 Sandf. 137; *M., etc., R. R. Co. v. Fisk*, 33 N. H. 297; *In re B. S. R. R. Co.*, 34 Hun, 414; *In re N. Y. B. Co.*, 67 Barb. 295; *In re Thirty-fourth St. R. R. Co.*, 102 N. Y. 347.) There were no other prerequisites to condemnation proceedings than those hereinabove cited, neither consents of property owners nor a consent of the municipal authorities, though as a matter of fact both have been obtained. The taking of the property in question will be for a public use. (*In re N. F. & W. R. R. Co.*, 108 N. Y. 378.) When the power of eminent domain has

Opinion of the Court, per FINCH, J.

undoubtedly been conferred by a statute, then in so far as it attempts to define the location or route it is to receive a reasonable rather than a strict construction. (Lewis on Eminent Domain, § 25; *In re N. Y. C. R. R. Co.*, 40 Hun, 1.)

W. W. MacFarland for respondent. The petitioner has not taken the steps necessary to entitle it to condemn the respondent's property. (*In re Boston*, 10 Abb. [N. C.] 104; *New York v. Goodwin*, 12 Abb. [N. S.] 21; *New York v. New York*, 11 Abb. [N. C.] 386). No power to condemn land is given by the statute. (Lewis on Eminent Domain, §§ 240, 253, 254.) The act of 1884, which refers to and incorporates the General Railroad Law, is unconstitutional and void. (Const., art 3, § 17.) The property in question is not required as a public use. (Const., art. 1, § 6; *In re N. F. & W. R. R. Co.* 108 N. Y. 375.)

FINCH, J. The petitioner seeks to condemn land for the purposes of its railway, and its right to do so is here in controversy. It was organized under the act passed May 6, 1884, entitled "An act to provide for the construction, maintenance and operation of street surface railroads and branches thereof in cities, towns and villages," and became a corporation by force of that act. The incorporators assumed the name of the South Beach Railway Company, and certified the objects of the corporation to be to construct and operate a street surface railway from the Arrochar station of the Staten Island Rapid Transit Railroad Company on Richmond avenue in the village of Edgewater, along Richmond avenue to Sea avenue, along Sea avenue to the Boulevard parallel with the south beach, and thence along that Boulevard "to a point at or near Bergman's hotel," the whole distance being about one mile. It does not now propose to build that line, or indeed to build a street railroad at all. It has filed a map of its intended route which crosses Richmond avenue, but does not run through or along it, which does not touch Sea avenue at any point, which is located upon private property and out of the streets for the

Opinion of the Court, per FINCH, J.

whole distance from its starting point until it reaches the Boulevard, along which it goes for a short distance to the hotel at which it ends. This new line is located almost wholly upon the land of Mrs. Byrnes, which it is now sought to condemn, and the proceeding is defended upon the ground that the act of 1884 authorizes a construction not only upon and along streets and avenues, but also "through, along and upon any private property which said company may acquire for the purpose;" and also upon the ground that the act confers upon the corporations formed thereunder all the powers and privileges granted by the General Railroad Act of 1850, and so the right to change the selected route from streets and avenues to private property, and condemn the land along the new line is given.

We need not stop to discuss the constitutional question raised by the reference to the act of 1850, or deny for present purposes the right of a street railway to condemn in some cases and for some uses the land of a private owner, since admitting all that, without so deciding, we are yet of opinion that this proceeding cannot be maintained.

Section 13 of the act of 1850, allows any corporation organized thereunder to obtain by condemnation such land as is "required for the purposes of its incorporation." The power is not general or unlimited. The company cannot condemn what it pleases, but only such and so much land as the proper execution of its corporate purposes shall require and render necessary. What then were the purposes of the incorporation of the South Beach Railroad Company? Obviously, they are those and those only which the law of its organization describes and defines, and which are certified in its articles of association, operating, when filed, as its charter and the measure of its authority. Referring to those we see that the corporate purposes were not to build a railroad between specified termini by the most feasible route, which is the characteristic of an ordinary railroad, but to build and operate a street railroad, such as the act of 1884 contemplates and regulates; and not only that, but one running along three specified avenues in

Opinion of the Court, per FINCH, J.

the town of Edgewater and not at all through or along private property. Such are the prescribed and declared purposes of the incorporation, and the company, it may be conceded, might have the right to acquire by condemnation such and so much of private property as should be reasonably necessary to accomplish those purposes. Now the chief element of a street railway, as authorized by the act of 1884, is that it is built upon and passes along streets and avenues for the convenience of those living or moving thereon. Its fundamental purpose is to accommodate the street travel, and its motive power is dictated and regulated to that end; and while, consistently with its general object, it may need for switches or storage, or stables or stations the land of private owners, yet that necessity is only incidental to the main purpose of a line along the streets accommodating the street travel. Here the land of Mrs. Byrnes is needed to build the main and principal part of the line, only that it may avoid the streets altogether. The act of 1884 stamps an indelible mark upon the corporations which it organizes. The consent of the local authorities is to be obtained, and that of a certain portion of the abutting owners, or in default of the last the certificate of chosen commissioners. Every step of the way, through all the conditions of the act, it plainly contemplates a railway along the streets and avenues of a village or city. The petitioner chose to organize under that act, to build and operate the kind and character of railway which it contemplated, to declare in precise terms that the objects of its incorporation were exactly those of a street railway along named avenues of the village of Edgewater. It is very plain, therefore, that none of the land of Mrs. Byrnes is required for the purposes of its incorporation by the South Beach Railway Company, but that the property is wanted to enable the company to disown and abandon those purposes and cease to be a street railway at all. If we upheld this contention, it might be possible to build a street railway for a city along a hundred feet of a street and then condemn the land in the center of the blocks all the way to its terminus. A change of route is possible under the act of 1850, where, as is usually

Statement of case.

the case, freedom to change exists under the charter, but where a change of a route involves not only a contradiction and violation of the articles of association, but also of the character and quality of the corporation, it becomes more than a mere change. It follows that since the land sought to be condemned is not required for the purposes of the incorporation, but to enable those purposes to be substantially abandoned, the proceedings cannot be upheld.

The order of the General Term should be affirmed with costs.

All concur.

Judgment affirmed.

CARRIE WEIL, an Infant, by Guardian, etc., Appellant, v. DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD COMPANY, Respondent.

119	147
147	482
119	147
155	471
119	147
156	849
119	147
170	183

In an action to recover damages for injuries alleged to have been caused by defendant's negligence, plaintiff's evidence was to this effect: Plaintiff, a child two years of age, lived with her parents on the first floor of a building fronting on a street twenty-six feet wide from curb to curb, through which defendant's road runs; her father carried on the bakery business on the same floor. Plaintiff was with her father in the store, the door of which, on account of the heat, was left open. She went behind the counter, and while he supposed she still remained there she escaped into the street and was run over by one of defendant's cars. She had been out of her father's sight not more than two minutes. Plaintiff was nonsuited on the ground that her parents were negligent in omitting to exercise a proper degree of care and watchfulness. *Held*, error; that the question was one of fact for the jury.

(Argued January 14, 1890; decided January 21, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the City of New York, entered upon an order made January 28, 1889, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial.

The nature of the action and the material facts are stated in the opinion.

Statement of case.

Clemens J. Kracht and *Albert I. Sire* for appellant. The plaintiff is entitled to the most favorable inferences deducible from the evidence, and all contested facts are to be deemed established in his favor. (*Rehberg v. Mayor, etc.*, 91 N. Y. 137, 141; *Stackus v. N. Y. C. & H. R. R. R. Co.*, 79 id. 464.) There was no contributory negligence on the part of the parent. (*Prendergast v. N. Y. C. & H. R. R. R. Co.*, 58 N. Y. 652; *Birkett v. K. I. Co.*, 110 id. 504; *Fallon v. C. P. & N. & E. R. R. R. Co.*, 64 id. 13; *Fisselmayer v. T. A. R. R. Co.*, 2 N. Y. S. R. 75; *Mangam v. B. R. R. Co.*, 38 N. Y. 455; *Gibbons v. Williams*, 135 Mass. 333; *McGeary v. E. R. R. Co.*, Id. 363; *Baxter v. S. A. R. R. Co.*, 3 Robt. 510; *Wolfkiel v. S. A. R. R. Co.*, 38 N. Y. 49; *Stackus v. N. Y. C. & H. R. R. R. Co.*, 79 id. 464; *Hart v. H. R. B. Co.*, 80 id. 622; *Nash v. N. Y. C. & H. R. R. R. Co.*, 14 N. Y. S. R. 531; *McQuingan v. D., L. & W. R. R. Co.*, Id. 651; *Ernst v. H. R. R. R. Co.*, 35 N. Y. 18, 41.) The driver of defendant's car was guilty of gross negligence. (*Stone v. D. D., etc., R. R. Co.*, 115 N. Y. 109; *Mangam v. B. R. R. Co.*, 38 id. 455; *R. R. Co. v. Gladman*, 15 Wall. 401; *Hyland v. Y. R. R. Co.*, 15 N. Y. S. R. 824; *Moebus v. Hermann*, 108 N. Y. 349; *Myers v. Dixon*, 3 J. & S. 390; *Pascoshell v. Twenty-third St. R. Co.*, 23 Wkly. Dig. 200; *Bardenburgh v. B. C., etc., R. R. Co.*, 56 N. Y. 652; *Sheehan v. Edgar*, 58 id. 631; *Moody v. Osgood*, 66 Barb. 644; 54 N. Y. 488, 493; *Johnson v. H. R. R. R. Co.*, 6 Duer, 633; *Guind v. S. A. R. R. Co.*, 8 Hun, 494; 67 N. Y. 596; *Barry v. N. Y. C. & H. R. R. R. Co.*, 92 id. 289; *McGrath v. N. Y. C. & H. R. R. R. Co.*, 63 id. 531; *Knuple v. K. I. Co.*, 84 id. 488; *Beisiegel v. N. Y. C. R. R. Co.*, 14 Abb. [N. S.] 29.) Plaintiff being *non sui juris*, her negligence, if any, is no bar to recovery. (*Kunz v. City of Troy*, 104 N. Y. 344; *Ihl v. Forty-second St. R. R. Co.*, 47 id. 317; *McGarry v. Loomis*, 63 id. 104; *Birkett v. K. I. Co.*, 110 id. 506.) The negligence, if any, of plaintiff or her parents is no bar to a recovery, as injury could have been avoided by the exercise of ordinary care and caution on the part of defendant. (Whart. on Neg. [2d ed.] §§ 325, 326, 343, 388;

Statement of case.

S. & R. on Neg. [4th ed.] §§ 99, 483; *Kenyon v. N. Y. C. & H. R. R. Co.*, 5 Hun, 479; 76 N. Y. 607; *Green v. E. R. Co.*, 11 Hun, 333; *Austin v. N. J. S. Co.*, 43 N. Y. 75, 82; *Button v. H. R. R. Co.*, 18 id. 248, 258; *Blanchard v. N. J. S. Co.*, 59 id. 292, 296; *McGrath v. H. R. R. Co.*, 32 Barb. 144; 19 How. Pr. 211; *Haley v. Earle*, 30 N. Y. 208; *Connery v. Slavin*, 23 Wkly. Dig. 545; *Mallard v. N. A. R. R. Co.*, 7 N. Y. Suppl. 666; *Klein v. Jewett*, 26 N. J. Eq. 474; *Priest v. Nichols*, 116 Mass. 401; *Radley v. N. R. R. Co.*, L. R. [1 App. Cas.] 759; *Davis v. Mann*, 10 M. & W. 546; *Tuff v. Warman*, 5 C. B. [N. S.] 573; *Scoville v. H., etc., R. R. Co.*, 81 Mo. 434; *Welsh v. J. etc., R. R. Co.*, Id. 466.) The question of negligence should have been submitted to the jury. (*Stackus v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 464; *McGrath v. H. R. R. Co.*, 32 Barb. 144; *Endress v. L. S. & M. S. R. R. Co.*, 19 N. Y. S. R. 481; *Keller v. N. Y. C. R. R. Co.*, 24 How. Pr. 172; *Wolfkiel v. S. A. R. R. Co.*, 38 N. Y. 49; *Nichols v. S. A. R. R. Co.*, Id. 131; *Hart v. H. R. B. Co.*, 80 id. 622; *Wooden v. Austin*, 51 Barb. 9; *Monroe v. T. A. R. R. Co.*, 18 J. & S. 114; *Vanderwald v. Olsen*, 1 N. Y. S. R. 506; *Thompson v. Lumly*, 50 How. Pr. 105; *Fairfax v. N. Y. C. & H. R. R. Co.*, 8 J. & S. 128; *Myers v. Dixon*, 3 id. 392; *Byrnes v. N. Y., L. E., etc., R. R. Co.*, 22 N. Y. S. R. 936; *Rehberg v. Mayor, etc.*, 91 N. Y. 137, 141; *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 id. 494.) The General Term erred in viewing the testimony in the most unfavorable light and drawing the most unfavorable inferences therefrom. (*Stackus v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 464; *McGrath v. H. R. R. Co.*, 32 Barb. 144; *Kellar v. N. Y. C. R. R. Co.*, 20 How. Pr. 172; *Rehberg v. Mayor, etc.*, 91 N. Y. 137, 141; *Justice v. Lang*, 52 id. 331.)

John M. Scribner for respondent. There was no error in granting the defendant's motion for a nonsuit. (*Tolman v. S., etc., R. R. Co.*, 98 N. Y. 198; *Button v. H. R. R. Co.*, 18 id. 248; *Hale v. Smith*, 78 id. 480, 483; *Hart v. H. R. B. Co.*, 84 id. 56, 62; *Becht v. Corbin*, 92 id. 658; *Wendell v.*

Statement of case.

N. Y. C. R. R. Co., 91 id. 420, 427; *Reynolds v. N. Y. C. R. R. Co.*, 58 id. 250; *Cordell v. N. Y. C. R. R. Co.*, 75 id. 332; *Deyo v. N. Y. C. R. R. Co.*, 34 id. 9, 14; *Wilds v. H. R. R. Co.*, 24 id. 432; *Davenport v. B. C. R. R. Co.*, 100 id. 632.) The negligence of plaintiff's father in permitting her to get into the street and on to the railroad track, under the circumstances disclosed by the evidence, is imputable to the child herself and defeats her right of action. (*Hartfield v. Roper*, 21 Wend. 615; *Thurber v. H. B. M. & F. R. R. Co.*, 60 N. Y. 333; *Wendell v. N. Y. C. R. R.* 91 id. 420; *Flood v. B., N. Y. & P. R. R. Co.*, 23 N. Y. Wkly. Dig. 501; *Tolman v. S. R. R. Co.*, 98 N. Y. 202; *Honegsberger v. S. A. R. R. Co.*, 1 Keyes, 572; *Burke v. B. & S. A. R. R.*, 49 Barb. 529; *Chrystal v. T. & B. R. R. Co.*, 105 N. Y. 164; *McGuire v. Spence*, 91 id. 305; *Kunz v. City of Troy*, 104 id. 344; *Murphy v. Orr*, 96 id. 16; *Birkett v. K. I. Co.*, 110 id. 504; *Mangam v. B. R. R. Co.*, 38 id. 456, 457; *Flynn v. Hatton*, 43 How. Pr. 333, 356; *Brown v. E. & N. A. R. R. Co.*, 58 Me. 388; *Holly v. B. G. Co.*, 8 Gray, 132; *Morrison v. E. R. Co.*, 56 N. Y. 302; *City of Chicago v. Starr*, 42 Ill. 175; *P., F. W. & C. R. R. Co., v. Vining*, 27 Ind. 513; *Fitzgerald v. S. P., etc., R. R. Co.*, 29 Minn. 236; *J., etc., R. R. Co., v. Bowen*, 40 Ind. 545; 49 id. 154; *Wright v. M., etc., R. R. Co.*, 4 Allen, 283; *L. & I. R. R. Co. v. Huffman*, 28 Ind. 289; *E., etc., R. R. Co. v. Wolf*, 59 id. 89; *Waite v. N. E. R. R. Co.*, 5 Jur. [N. S.] 936; 28 L. J. [Q. B.] 260; *Singleton v. E. C. R. R. Co.*, 7 C. B. [N. S.] 287; *Mangam v. Atterton*, L. R. [1 Exch.] 239; *Callahan v. Bean*, 9 Allen, 401; *Glassy v. H., etc., R. R. Co.*, 57 Penn. St. 172; *Railroad Co. v. Long*, 25 P. F. Smith, 257; *P. & R. R. R. Co. v. Hummell*, 8 Wright, 379; *Gibbons v. Williams*, 135 Mass. 333.) There was no negligence in failing to prevent a child from approaching unseen the side of a car after the horses have passed, and thus to be injured by the car wheels. (*Bulger v. A. R. Co.*, 42 N. Y. 459; *Unger v. F. S. S. R. R. Co.*, 51 id. 497.) The defendant was not negligent in running this car without a conductor. (*B. C. R. R. Co. v. City of*

Opinion of the Court, per O'BRIEN, J.

Brooklyn, 37 Hun, 413; *Lamline v. H. W. S., etc., R. R. Co.*, 6 N. Y. S. R. 248.) The question of negligence or want of negligence on an undisputed state of facts, is always a question of law to be decided by the court. (*Gonzales v. N. Y. & H. R. R. Co.*, 38 N. Y. 440; *Smith v. H. R. R. Co.*, 92 Penn. St. 450; *R. R. Co. v. Long*, 25 P. F. Smith, 257.)

O'BRIEN, J. This action was brought to recover damages for personal injuries sustained by the plaintiff, she having been thrown down and run over by one of defendant's cars, passing in front of her father's residence in Lewis street, in the city of New York, on the 13th day of July, 1886.

On the trial of the action in the Superior Court the plaintiff was nonsuited, and the judgment has been affirmed by the General Term of that court.

The question here is whether the trial court, upon the testimony before it, was warranted in disposing of the case as a question of law instead of submitting it to the jury as one of fact. The plaintiff, at the time the accident occurred, was a few days under two years of age and the nonsuit proceeded upon the ground that her parents, with whom she lived, neglected to exercise that care and restraint over her that the law requires in case of children of such tender years; that this neglect is imputable to the plaintiff and precludes her from recovering damages for the injury.

It appears that the plaintiff with her father and mother, at the time the accident occurred, resided on the first floor of a house in Lewis street, the father keeping a bakery store on the same floor and a bakery underneath, or in the basement, and carried on the bakery business. The street in front, through which the railroad runs and where the plaintiff was injured, is about twenty-six feet in width from curb to curb. The fires in the bakery under the store and the heat of the day raised the temperature in the rooms on this narrow street to such a degree that the door leading to the street was left open. About four or five o'clock of the day, the mother of the child, desiring to do some cooking in the kitchen, took her to her

Opinion of the Court, per O'BRIEN, J.

father in the store and requested him to take care of her. The child after playing and talking with her father for a couple of minutes went behind the counter and remained there some time. While she was there, or at least while the father supposed she was there, he proceeded to make some entries on his books in regard to the business of the day and while he was thus engaged the child escaped through the door into the street and was run over by one of defendant's cars. The evidence is not very clear as to the period of time that the plaintiff was absent from the father's sight prior to the accident, but we think that the jury could have found that it did not exceed two minutes, and it was not more than ten or fifteen minutes from the time that the mother left the plaintiff with the father, in the store, to the time that the accident actually occurred; that the plaintiff was quite seriously, if not permanently, injured is not disputed. In regard to the negligence of the defendant, it was shown that it was a one-horse car with a driver but no conductor. When approaching the bakery where the plaintiff lived, and for a space of eighty to one hundred feet, the horse was driven on a gallop at the rate of from seven to ten miles per hour. The driver could have seen the plaintiff in the street had he been looking ahead, but his attention was directed to the rear of the car and to the opposite side of the street to warn off some boys who were improperly attempting to ride upon the rear platform. It is apparent that the driver did not see and could not have seen the plaintiff when she was struck, as his back was turned toward the house and the same rate of speed was kept up for a considerable distance past the point in the street where the accident happened. There was, therefore, evidence in the case competent and proper for the consideration of the jury on the question of the defendant's negligence.

We think that the trial court was not warranted in deciding upon the evidence as it stood, when the case was closed, that, as matter of law, the parents of the plaintiff neglected to observe that degree of care and watchfulness in regard to her movements, under all the circumstances, that the law imposed upon them. In reviewing a judgment of nonsuit the plaintiff is

Statement of case.

entitled to the most favorable inference deducible from the evidence, and all contested questions of fact are to be deemed established in her favor, and when, from the facts and circumstances shown, inferences are to be drawn which are not certain and incontrovertible, the question becomes one of fact. The plaintiff's parents were bound to protect her from danger so far as that could be done by the exercise of reasonable prudence and care. The law did not require the father to suspend his business and keep the child every moment under his eye. He was required only to exercise such a degree of care as was reasonable in his situation and under all the circumstances of the case. Whether in this case the father did, in fact, all that a reasonably careful and prudent man ought to have done under the circumstances, was a question for the jury and not for the court. (*Birkett v. K. I. Co.*, 110 N. Y. 506; *Kunz v. City of Troy*, 104 N. Y. 344; *Stackus v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 464.)

The case, therefore, should have been submitted to the jury.

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

119	153
135	633

JOHN GOOD, Respondent, v. WILLIAM S. DALAND et al.,
Appellants.

A respondent, in moving to dismiss an appeal on the ground that the time for appealing had expired before service of notice of appeal, stands upon a strict right and must show a strict and technical compliance with the statute on his part to entitle him to the relief sought.

Where an alleged copy of judgment served was a true copy except the attestation of the clerk, required by the Code of Civil Procedure (§§ 1236, 1237), which was omitted, *held*, that the paper served was not a complete copy, and the service did not initiate the running of the time limited for appealing.

Van Alstyne v. Cook (25 N. Y. 489), *Goelet v. Spofford* (55 N. Y. 647), *Clapp v. Hawley* (97 N. Y. 610), distinguished.

Where, on motion to dismiss an appeal in a case, in which an interlocutory judgment had been entered on a demurrer, and so to authorize

Opinion of the Court, per ANDREWS, J.

an appeal, the certificate of the court below was required (Code Civ. Pro. § 190, subd. 4), the appellant asked for leave to apply to the court below for the requisite certificate, which application was denied, *held*, that this did not preclude the appellant from thereafter making such application without leave, and on procuring the certificate from again appealing.

(Argued January 14, 1890; decided January 21, 1890.)

MOTION to dismiss appeal from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made June 28, 1889, which affirmed an interlocutory judgment, entered upon an order overruling demurrers to plaintiff's complaint.

The appellants appealed to this court from the judgment of the General Term without obtaining the certificate of the General Term, required by the Code of Civil Procedure (§ 190 sub. 4) "that in its opinion the question therein is of sufficient importance to render a decision of the Court of Appeals desirable before proceeding further." The respondent moved to dismiss the appeal because of the failure to procure such a certificate; on the hearing of the motion the appellants applied for leave to make application to the court below for the certificate; this was denied and the appeal dismissed. Thereupon the appellants made the application, procured the certificate and again appealed. This was more than a year after, as the respondent claimed, a copy of the judgment with notice of entry was served.

Further facts appear in the opinion.

Albert G. MacDonald for motion.

Calvin Frost and *Charles S. Atterbury* opposed.

ANDREWS, J. The defendants had sixty days, after the service on their attorney of a copy of the judgment and notice of the entry thereof, within which to appeal to this court, and the right to have the appeal heard in a case like this was subject to the further condition that a certificate should be obtained from the General Term. (Code, § 190,

Opinion of the Court, per ANDREWS, J.

sub. 4.) The certificate was obtained December 9, 1889, and notice of appeal was served on the plaintiff's attorney, together with a copy of the certificate, December 16, 1889. The motion to dismiss is based on two grounds: (1) That the time to appeal had expired before the service of the notice of appeal, and (2) that the certificate was obtained after this court had denied the application of the defendants made in October, 1889, on the hearing of the motion to dismiss the former appeal, to be permitted to apply to the court below for the proper certificate.

The motion to dismiss should be denied.

The validity of the first ground urged depends upon the question whether the paper served by the plaintiff on the attorney for the defendants, July 5, 1889, was a copy of the judgment rendered by the General Term, within the meaning of the Code. The paper served was a true copy of the judgment, except that it did not have the attestation of the clerk. Section 1236 of the Code prescribes that the clerk must keep a book for the entry of judgments, styled a "judgment book," and that "each interlocutory or final judgment must be entered in the judgment book, and attested by the signature of the clerk." And section 1237 directs that the clerk, "upon entering final judgment, must immediately file the judgment-roll." The provision for attestation prescribed in section 1236, as said by FINCH, J., in *Knapp v. Roche* (82 N. Y. 369), "was not new, but was founded upon a rule of the Revised Statutes (part 3, tit. 4, chap. 6, art. 2, § 11), which provides that no judgment should be deemed valid unless the record thereof should be signed and filed." It is not necessary to hold, and it would be harmful to hold, that the omission of the clerk to sign a judgment, otherwise properly entered, would deprive a party of rights under a judgment. The judgment would be irregular, but not void, and the defect would be amendable in furtherance of justice. But the respondent, in moving to dismiss the appeal on the ground that the time for appealing had expired before the notice of appeal was served, stands upon a strict right and must show a strict and

Statement of case.

technical compliance with the statute on his part, to entitle him to this relief. We think the paper served was not a copy of the judgment, so as by its service, to initiate the running of the limitation. The cases of *Goelet v. Spofford* (55 N. Y. 647); *Van Alstyne v. Cook* (25 id. 489), and *Clapp v. Hawley* (97 id. 610), are not in point. The first two cases arose under the former Code, in which there was no requirement that the judgment entered should be attested by the clerk. (§§ 280, 281.) The question in each case arose on the trial of the action, and the point was raised that the judgment in question, not having been signed by the clerk, was void. In *Clapp v. Hawley*, the point decided was in substance that the *fiat* of the judge, in the direction for judgment, was no part of the judgment itself.

The second ground of the motion proceeds on the erroneous assumption that the denial by this court of the application of the defendants to be permitted to apply to the court below for the requisite certificate, made on the motion to dismiss the former appeal for want of a certificate, precluded the defendants from thereafter making such application without leave. The substance of the former action of the court was to refuse to stay the plaintiff's motion to dismiss until the defendants could remedy the defect in their proceedings, and did not interfere with the right of the defendants to make such further application to the court below as they should be advised.

The present motion should be denied, with ten dollars costs.

All concur.

Motion denied.

WILLIAM HARRIGAN, Respondent, v. THE CITY OF BROOKLYN,
Appellant.

The provision of the charter of the city of Brooklyn (§ 30, tit. 22, chap. 583, Laws of 1888) prohibiting the maintenance of an action against the city, unless it shall appear by the complaint that thirty days have elapsed

Statement of case.

since the presentation of the claim or claims upon which the action is founded duly verified to the comptroller of the city for adjustment, does not apply to claims arising *ex delicto*.

Minick v. City of Troy (83 N. Y. 514), *Reining v. City of Buffalo* (102 id. 309), *Dickinson v. Mayor, etc.* (92 id. 584), *Brehm v. Mayor, etc.* (104 id. 186), distinguished.

(Submitted January 13, 1890 ; decided January 28, 1890.)

APPEAL from an interlocutory judgment of the City Court of Brooklyn, entered upon an order made June 24, 1889, which affirmed an interlocutory judgment, entered upon an order sustaining a demurrer to plaintiff's complaint.

This action was brought to recover damages for injuries alleged to have been caused by defendant's negligence.

Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, in that it omitted to state that the claim, duly verified, had been presented to the comptroller for adjustment and at least thirty days had elapsed.

Almet F. Jenks, corporation counsel, for appellant. Compliance with section 30 of chapter 583 of the Laws of 1888 is a condition precedent to plaintiff's right of action. (*Reinig v. City of Buffalo*, 102 N. Y. 308.) The statute is applicable to actions in tort. (*Reinig v. City of Buffalo*, 102 N. Y. 308 ; *Duryee v. Mayor, etc.*, 26 Hun, 120, 123 ; *Reed v. Mayor, etc.*, 31 id. 312 ; 97 N. Y. 620 ; Laws of 1860, chap. 379 ; *Dickinson v. Mayor, etc.*, 92 N. Y. 584, 589 ; *Brehm v. Mayor, etc.*, 104 id. 186, 191 ; *Minick v. City of Troy*, 83 N. Y. 516 ; *Coster v. Mayor, etc.*, 43 id. 413 ; *Baine v. City of Rochester*, 85 N. Y. 523 ; Code Civ. Pro. § 3245.)

William J. Gaynor for respondent. In the light of the decision of the court, the appeal does not present an open question. (Code Civ. Pro. § 3245 ; *Taylor v. Cohoes*, 105 N. Y. 54 ; *Gage v. Hornellsville*, 106 id. 667 ; *McGaffin v. Cohoes*, 74 id. 387.) The statute under construction in this action is obviously at least as narrow in its scope as the Code provision hereinbefore cited. In express terms it limits itself

Opinion of the Court, per ANDREWS, J.

to "the claim or claims upon which said action or special proceeding is founded." (Laws of 1886, chap. 572.)

ANDREWS, J. This case is governed by the decision in *Howell v. City of Buffalo* (15 N. Y. 512). It was there held that a charter provision in the charter of Buffalo declaring that "it should be a sufficient bar or answer to an action or proceeding in any court for the collection of any demand or claim against the city that it had never been presented to the council for audit or allowance," did not apply to claims arising *ex delicto*. The same principle of construction has been applied to statutory provisions prohibiting the allowance of costs in action against municipal corporations, unless the *claim* upon which the action is founded had been presented to the chief fiscal officer of the corporation before the commencement of the action. (Laws 1859, chap. 262; Code Civ. Pro. § 3245; *McClure v. Niagara*, 3 Abb. Ct. App. Dec. 83; *Taylor v. City of Cohoes*, 105 N. Y. 54; *Gage v. Village of Hornellsville*, 106 id. 667.) The cases of *Minick v. City of Troy* (83 N. Y. 514), and *Reining v. City of Buffalo* (102 id. 309), arise under charter provisions which in terms include claims *ex delicto*, and are not in conflict with the other cases.

The charter of Brooklyn, under which the present contention arises, declares that "no action or special proceeding" shall be maintained against the city, unless it shall appear by the complaint that at least thirty days had elapsed "since the claim or claims, upon which said action or special proceeding is founded, were presented in detail and duly verified by such claimant or claimants to the comptroller of said city for adjustment," and a subsequent clause in the same section authorizes the comptroller to require "any person presenting for settlement an account or claim," to be sworn and answer orally as to any facts relative to the justness of such "account or claim." (Chap. 583, Laws of 1888, tit. 22, § 30.)

The words "claim or account," in connection with the purpose of presentation, and the designation of the officer to whom the presentation is to be made, naturally indicate claims

Opinion of the Court, per ANDREWS, J.

on contract which may, in ordinary course, be adjusted by the comptroller or chief financial officer or officers of the city, the justness of which may be ascertained by the summary method of examination provided. There is nothing in the language of the charter to take the case out of the operation of the decisions. In *Dickinson v. Mayor, etc.* (92 N. Y. 584), and *Brehm v. Mayor, etc.* (104 id. 186), it was assumed by counsel that the provision in the New York Consolidation Act (Laws of 1873, chap. 385, § 105), applied to actions *ex delicto*. Upon this assumption the question was presented in the first case whether the statute of limitations on a cause of action for negligence commenced to run from the time of the injury, or from the time of the demand made on the comptroller, and it was held that the charter provision did not postpone the period for the commencement of the limitation prescribed by the general statute, and in the second case, that a delay of thirty days after presentation of a claim, did not bar the cause of action where the six years expired during that period. The court did not consider the question now presented.

There has been a diversity of opinion in the Supreme Court upon the question, but the general rule having been declared by this court in analogous cases, we think there is no reason for now changing it. The opinions below contain an exhaustive review of the cases on the subject, and further elaboration is unnecessary.

We concur in the conclusion reached, and the judgment should be affirmed, with leave to the defendant to apply to the court below for leave to answer.

All concur.

Judgment accordingly.

Statement of case.

119	160
147	159
119	160
167	394

GEORGE C. BUELL et al., Respondents, v. BENJAMIN T. VAN CAMP, THE ORLEANS COUNTY NATIONAL BANK, a subsequent judgment creditor, Appellant.

Where the affidavit, upon which an attachment was issued, stated that a cause of action existed in favor of plaintiff against defendant for an amount stated and then set forth the grounds of the claim, to wit, an indebtedness for goods sold to the amount specified, and also stated that no part had been paid but the whole was due and owing, *held*, that this was a sufficient compliance with the provision of the Code of Civil Procedure (§ 636) requiring a plaintiff, on application for an attachment, to show by affidavit that he "is entitled to recover a sum stated therein." An attachment was applied for and granted, on the ground that the defendant had departed from the state with intent to defraud his creditors, which was alleged by plaintiff in his affidavit, on information and belief; he stated that the sources of his information and the grounds of his belief were the affidavits of two persons named, which he averred had that day been presented to the judge to whom the application was made and by him ordered filed. Copies of said affidavits were attached; these contained statements of facts sufficient to show the departure with the intent alleged. *Held*, that the affidavit was sufficient to give jurisdiction to issue the attachment.

(Argued January 13, 1890; decided January 28, 1890.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made June 21, 1889, which reversed an order of Special Term vacating an attachment.

The facts are sufficiently stated in the opinion.

H. E. Sickels for appellant. To authorize the bank to make a motion to vacate the attachment it must show that it had "acquired a lien upon or interest in the defendant's property after it was attached by the plaintiffs;" this it did do (Code Civ. Pro. §§ 636, 682, 1216, 1246, 1370; *S. C. Bank v. Allenger*, 75 N. Y. 179; *T. P. Co. v. Hart*, 85 id. 500.) To procure an attachment for breach of contract the plaintiff must show, by affidavit that he is entitled to recover a sum stated therein over and above all counter-claims known to him. (Code Civ. Pro. § 636; *Marine Bank v. Ward*, 35 Hun, 395; *Smith v. Davis*,

Opinion of the Court, per EARL, J.

29 id. 306; *Thorington v. Merrick*, 101 N. Y. 5.) All the allegations to show that the defendant had left the state to defraud his creditors or to avoid the service of a summons are upon this information, and no reason is given why the affidavits of the informants are not produced. Such evidence gave no right to an attachment. (*S. C. Bank v. Alberger*, 79 N. Y. 252; *Bennett v. Edwards*, 27 Hun, 352; *Buhl v. Ball*, 41 id. 61; *Marine Bank v. Ward*, 35 id. 395.) There was no error in not allowing plaintiff at Special Term to read his own affidavit in evidence to show that the "original affidavits of Jerome and Kelsey were in the actual presence of the judge and then considered by him," when the attachment was created. (Code, §§ 636, 639.)

Horace McGuire for respondents. The moving papers did not show that the bank was in a position to assail our attachment. (*Sutton v. Dillaye*, 3 Barb. 529; 5 Civ. Pro. Rep. 191; Code Civ. Pro. § 1250; *Herman v. M. Ins. Co.*, 81 N. Y. 184; 2 Rumsey's Pr. 570; *Finn v. Smith*, 93 N. Y. 91.) It was error in the Special Term to refuse to allow plaintiffs to read supporting affidavits upon the motion papers. (*Godfrey v. Godfrey*, 75 N. Y. 434; *Ives v. Holden*, 14 Hun, 402.) The Special Term should have sustained the plaintiffs' attachment upon the papers. (*Stevens v. Middleton*, 26 Hun, 470; *James v. Richardson*, 39 id. 399; *Bennett v. Edwards*, 27 Hun, 353; *Whitney v. Hirsch*, 39 id. 325; *Colvert v. Van Valen*, 6 How. Pr. 102.) The affidavits contained sufficient evidence to call upon the officer granting the attachment to exercise his judgment upon the weight of the evidence to establish the grounds of the application. (1 Rumsey's Pr. 510, 511; *In re Bliss*, 7 Hill, 187; *Haebler v. Bernhart*, 26 N. Y. S. R. 230; *Bennett v. Edwards*, 27 Hun, 352.)

EARL, J. This is an appeal from an order of the General Term reversing a Special Term order, which set aside plaintiffs' attachment granted by a county judge, on a motion made by the Orleans County Bank, a subsequent judgment creditor of Van Camp.

Opinion of the Court, per EARL, J.

Upon its motion at the Special Term, the bank used some affidavits; but in its notice of motion it was expressly stated that "the court will be asked to vacate the attachment upon the papers upon which it was granted by the county judge, and that the other papers will be read only for the purpose of showing its right to make the motion." The plaintiffs offered to read additional affidavits in support of the attachment in opposition to the motion, which the court declined to receive. The General Term, as appears from the opinion there pronounced, reversed the order of the Special Term on the ground that it declined to hear the additional affidavits offered to be read by the plaintiffs. But as the ground of the reversal does not appear in the order, we may assume here that the reversal was upon any ground justified by the facts of the case.

We are, however, of opinion that the original affidavit was sufficient to uphold the attachment.

The Code (§ 636) requires the plaintiff applying for a warrant of attachment, to show by affidavits to the satisfaction of the judge granting the same, among other things, that one of the causes of action specified in the preceding section exists against the defendant; and "if the action is to recover damages for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counter-claims known to him." It is claimed on the part of the appellant that this provision of the section was not complied with.

The affidavit on which the attachment was granted was made by one of the plaintiffs, and in it he stated that a "cause of action exists in favor of said plaintiffs against said defendant, for which said action is commenced, and that the amount of the plaintiffs' claim in said action is \$817.13, and interest from the 11th day of June, 1888, over and above all counter-claims and set-offs known to deponent, and that the grounds of said claims and cause of action are, as follows." Then it is stated that on the 13th of January, 1888, and between that date and the 18th day of May, 1888, the plaintiffs sold and delivered to the defendant certain groceries to the amount of \$420.46, includ-

Opinion of the Court, per EARL, J.

ing interest, which defendant agreed to pay, and which he had failed to pay, and that that sum was due and owing; that on the 18th of February, 1888, the defendant made his promissory note in writing whereby he promised to pay plaintiffs the sum of \$389.17, for value received, and delivered the same to them who are now the owners and holders thereof; that the note was given for groceries to the full amount thereof, theretofore sold and delivered to the defendant. These allegations are a sufficient compliance with that portion of the section above quoted and show that the plaintiffs were entitled to recover the sum stated in the affidavit, over and above all counter-claims known to them.

The ground upon which the attachment was applied for was, that the defendant had departed from the state to defraud his creditors and to avoid the service of a summons. It is alleged in the affidavit made by Buell, one of the plaintiffs, "that the defendant has departed from the state of New York, where he resided June 9, 1888, with intent to defraud his creditors and to avoid the service of a summons upon him; that this allegation is made upon information and belief, and the sources of deponent's information, and the grounds of deponent's belief, are the affidavits of Hiram Jerome and Addison Kelsey, verified June 11, 1888, and that day presented to the judge of Orleans county, and ordered filed in Orleans county clerk's office, copies of which are hereto annexed, and deponent refers to said original affidavits as a part of this affidavit."

The affidavit of Jerome is as follows:

"Hiram Jerome, being duly sworn, says that he resides in Carlton, N. Y.; that he is a brother-in-law of Benjamin F. Van Camp, and lives just across the road from the said Van Camp; that this afternoon deponent called at the late home of said Van Camp and found that he was absent therefrom; deponent found the wife of said Van Camp weeping and seeming in great grief, and she would not tell where said Van Camp was or talk on the subject. Deponent met his own wife coming from the house of Van Camp as he went in (deponent's wife is a sister of Van Camp's wife) and deponent's wife

Opinion of the Court, per EARL, J.

informed deponent then and there that said Mrs. Van Camp had just received a letter from Van Camp, stating that he was in Elgin, Canada, and that in a few days they would find out why he had left. Deponent says he was on the most intimate terms with Van Camp, saw him frequently, and was in Albion the day said Van Camp left for Canada, but that deponent had no information or knowledge that Van Camp had any intention to go to Canada; that deponent has talked with the members of said Van Camp's family upon the subject of his departure, and none of them knew of his intention to go to Canada, or that he was in Canada until said letter was received; that the affidavits of the members of said Van Camp's family, or of deponent's wife, is not produced because none of them are accessible."

And the affidavit of Kelsey is as follows :

"Addison Kelsey, being duly sworn, says that he is one of the heirs and legatees of Amos Kelsey, late of Gaines, N. Y., deceased, and that Benjamin F. Van Camp was executor of the will of said Amos Kelsey; that the business of the estate was substantially closed a long time ago; that some time ago the deponent, with others interested in the said estate, filed a petition with the surrogate of Orleans county, to whom jurisdiction in the matter belonged, praying that said Van Camp be ordered to show cause why he should not render his account as such executor; that thereupon an order was made by said surrogate returnable before him at ten o'clock this morning, addressed to said Van Camp, ordering him to show cause on the return thereof why he should not render his account as such executor; that said order was personally served upon said Van Camp in due time; that this morning said Van Camp did not appear upon the return of said order nor did any person on his behalf, and that an order has been taken revoking his letters testamentary; that deponent has been informed by one Britton, who keeps a boarding stable in the village of Albion, that said Van Camp left his horse and buggy there, with which he had come from his country home to the village on that day, and that he had not called for them, and that said Van Camp's family have

Opinion of the Court, per EARL, J.

come to-day and taken the horse and buggy away ; that he is informed by one Edward Rimsom that he saw said Van Camp go on the train that passes west towards Canada from Albion at half-past three last Saturday afternoon ; that deponent has inquired of the relatives and neighbors of said Van Camp, and that it is generally believed by them and it is currently reported that he has departed with intent to cheat his creditors ; several attachments have been obtained and that said Van Camp was very largely indebted."

Hearsay evidence is generally excluded upon the trial of issues of fact in actions. As a rule, it is not good common law evidence. But in collateral proceedings or matters of practice, where orders in the progress of actions are applied for, judges frequently act upon facts stated upon information and belief. In such proceedings absolute certainty is not expected ; the evidence is sufficient if convincing and satisfactory, is usually by affidavit, *ex parte*, and is not subjected to the test of cross-examination. All that is required is that the information furnished by the affidavit shall be such that a person of reasonable prudence would be willing to accept and act upon it. The mere averment, however, of a fact upon information and belief without more is not sufficient ; but the sources of the information and the grounds of the belief must be stated so that the judicial officer to whom the affidavit is presented may judge whether the information and belief have a proper basis to rest on ; and if he is satisfied that they have, then the affidavit is sufficient to invoke his jurisdiction and to be submitted to his determination. And such is the rule recognized we believe in all the cases on this subject. The rule which requires an affidavit to state the sources of the information and the ground of belief, implies that with such statements the affidavit will be sufficient, although the affiant has no personal knowledge of the principal facts necessary to be established.

We must assume that the affidavits of Jerome and Kelsey, while not made in this action, were legally made in some judicial proceeding, and that they were before the judge granting the attachment. The statements contained in those affi-

Statement of case.

davits, therefore, all have the sanction of a legal oath. Those statements are sufficient to show that Van Camp had departed from the state with intent to defraud his creditors and to avoid the service of summons.

We are, therefore, of opinion that the affidavit of Buell, which gave, as the source of his information and the ground of his belief, the averments contained in those affidavits, was sufficient to give the county judge jurisdiction to issue the attachment. Hence the General Term had jurisdiction to reinstate the attachment, and its order is not reviewable in this court.

The appeal should, therefore, be dismissed with costs.

All concur.

Appeal dismissed.

119 166
119 418

FRANK B. HODGKINS, Respondent, v. SARAH F. MEAD,
Appellant.

In an action upon an alleged contract to pay a sum specified for services rendered, the issue was as to the terms of the contract, it being conceded that if plaintiff was entitled to recover anything, it was the amount claimed, with interest. The court so charged, stating the precise sum plaintiff was entitled to, if the jury found a verdict in his favor. On adjournment of the court for the day, pursuant to stipulation of counsel, the jury were informed that they might seal their verdict; that they need not return in the morning to deliver it, but could deliver it to the officer in charge. The sealed verdict simply stated that the jury found for plaintiff. Upon reading the verdict the court stated it was a mistrial; no order setting aside the verdict was entered. At the same term a motion was made to amend the verdict, on an order to show cause, granted three days after the verdict, and on affidavits of the jurymen, to the effect that they all agreed upon a verdict for the full amount claimed, but being uncertain as to the exact amount stated by the court, signed the verdict supposing the amount would be inserted; the court amended the verdict by inserting the amount. *Held*, no error; that the court had the power to make the amendment and in exercising its discretion was guilty of no abuse thereof.

Jackson v. Williamson (2 T. R. 281), and *Rex v. Woodfall* (5 Burr. 2661), distinguished.

(Submitted January 13, 1890; decided January 28, 1890.)

Statement of case.

APPEAL from order of the General Term of the City Court of Brooklyn, made May 27, 1889, which affirmed an order of the court at a trial term, granting a motion on the part of plaintiff to amend or correct a sealed verdict herein.

The nature of the action, and the material facts are stated in the opinion.

Sewall Sergeant for appellant. In an action to recover money the jury must assess the amount of the damages. (Code Civ. Pro. § 1183.) If the jury fails to assess the amount of damages, there is no verdict. (*Clum v. Smith*, 5 Hill, 560; *Ex parte Cuykendall*, 6 Cow. 53; *Jackson v. Williamson*, 2 T. R. 281; *Davis v. Taylor*, 2 Chitty, 268; *Vaise v. Delamater*, 1 T. R. 11; *Carpenter v. Shelden*, 5 Sandf. 97; *Parker v. Laney*, 58 N. Y. 469; *Clark v. Richards*, 3 E. D. Smith, 93; *Dalrymple v. Williams*, 63 N. Y. 361, 363; *People v. Common Pleas*, 1 Wend. 300; 5 Burr, 2667; *Warner v. N. Y. C. R. R. Co.*, 52 N. Y. 443; *Dayton v. Church*, 7 Abb. [N. C.] 367; *Wells v. Cox*, 1 Daly, 515)

Henri Pressprich for respondent. The court had power to so amend its records as to conform them to the truth and such power cannot now be questioned. (Code Civ. Pro. § 723; *Burhans v. Tibbits*, 7 How. Pr. 21; *Wells v. Cox*, 1 Daly, 515; *Hawks v. Crofton*, 2 Burr, 698; *Rockfeller v. Donnelly*, 8 Cow. 652; *Petrie v. Hannay*, 3 T. R. 659; *Cheetham v. Tillotson*, 4 Johns. 508; 2 Thompson on Trials, §§ 2642, 2643.) The power or jurisdiction of the court to make the order appealed from being established, the only question remaining is "whether a case is made calling for its exercise." (*Dalrymple v. Williams*, 63 N. Y. 361; *Wells v. Cox*, 1 Daly, 515.) Affidavits from jurors upon such a motion as is appealed from, to prove what their verdict, as actually found, was, and upon which to justify the court in making an order conforming the verdict, may be received. (*Dalrymple v. Williams*, 63 N. Y. 361; *Wells v. Cox*, 1 Daly, 515.) The point urged by appellant, in various forms, that the cause

Opinion of the Court, per PECKHAM, J.

had been submitted to the jury, that the jury had been discharged, that the jury was not present when the court made the order conforming the verdict rendered to the verdict actually found, cannot have any weight in the determination of this appeal. (*Dalrymple v. Williams*, 63 N. Y. 351.) The appellant cannot urge successfully on this appeal that the remarks of the presiding judge upon the opening of the sealed verdict partook of the nature of, and were, an order of the court, made after due deliberation, irrevocable and not to be set aside. (Code, §§ 724, 772.)

PECKHAM, J. This action was brought to recover the amount of one per cent commission as a real estate broker upon the sum of \$80,000, being the purchase-price of certain real estate owned by appellant, which the plaintiff alleged he had procured a purchaser for upon the employment of the defendant.

The answer set up a special contract between the parties, by which the plaintiff was to claim and be entitled to no commissions except upon the performance by the proposed purchasers of the property, of the special contract of sale entered into between them and defendant, and the answer alleged a failure by the proposed purchasers, and that on account thereof the plaintiff had not earned his commissions. This was the sole question at issue between the parties, and it was assumed and conceded that if the plaintiff were entitled to a verdict at all, it was for the one per cent upon \$80,000, with interest from the time it was due. The charge of the judge to the jury was explicit upon the point, and he stated in so many words that if the plaintiff were entitled to a verdict, he must recover his commissions upon the purchase-price, with interest, amounting in all to the sum of \$848. The judge further said: "Now, you have a single question of fact to decide, whether you believe the testimony of the plaintiff, or the testimony of Mead, Sergeant and Meldrum, as to this arrangement made on the twenty-first day of February. If you find that there was an arrangement made that the com-

Opinion of the Court, per PECKHAM, J.

mission of plaintiff was conditional, then your verdict will be for the defendant, because the condition was never complied with. If, on the other hand, there was no condition, it is admitted here that the plaintiff was employed, and that he found a purchaser, and that the plaintiff would be entitled to a verdict." The precise amount of such verdict had already been stated by the court and there was no dispute about it.

The jury retired on the afternoon of March 8, 1889. The time of adjournment having been reached and the jury not having agreed, the court sent instructions to them that they might seal their verdict, and it was then agreed by the counsel for both parties that the jury need not return in the morning to deliver their verdict and that it might be sealed and received from the jury by the officer in charge and he should bring it into court in the morning. The jury agreed during the night and their verdict was written out by one of their number, signed by all, sealed and then delivered to the officer having them in charge, and thereupon they were discharged.

In the morning, at the opening of the court, the officer handed the sealed verdict to the court, who passed it to the clerk and told him to read it. The envelope was then broken and the verdict read aloud. It was as follows (after the title of the cause): "We, the undersigned, jurors empanelled in the above entitled action, do hereby certify that we find herein a verdict for the plaintiff." Signed by each juror. Upon the reading of the verdict, and according to the affidavit read on the part of the defendant, the court said, in substance: "This is what comes from letting a jury go. I will never do it again." The court then said to the counsel for plaintiff: "If you have any motion to make I will hear it now." Plaintiff's counsel said he had none then, but he would like time to consider it, to which the court said, in substance, that he must make it then or not at all, and the court then continued and said that it was a mistrial, and the counsel for defendant then withdrew from the court room, and no permission was granted plaintiff's counsel to make any

Opinion of the Court, per PECKHAM, J.

motion whatever while counsel for the defendant was in the court room. This statement of the agreement for the sealed verdict and for dispensing with the return of the jury, together with the recital of what took place when the verdict was opened in the morning in the court room, is taken from the affidavit used on the part of the defendant to oppose the motion made on the part of the plaintiff to amend the verdict. No order setting aside the verdict was ever entered, and there is nothing to contradict the implication arising from all the facts that the remark of the learned judge as to the mistrial was an informal expression of a hasty opinion, upon which no proceeding was ever based, and which opinion upon reflection he subsequently altered.

The counsel for the plaintiff, within three days of the bringing in of the verdict, and at the same term of the court, procured the affidavits of all the members of the jury to the effect that they all agreed upon a verdict for the plaintiff for the full amount claimed, and interest, but being uncertain as to the exact amount stated by the court made out a sealed verdict for the plaintiff, which each signed, supposing that the correct amount would be inserted at the opening of the court on receipt of their verdict, and each juror said it was his intention to find a verdict for the plaintiff for the full amount stated by the court. Upon these affidavits, and upon a copy of a charge of the judge, and upon the pleadings and the affidavit of the plaintiff's attorney, and at the same term of the court, on the twelfth of March, an order to show cause was granted, returnable on the fourteenth instant, why the verdict should not be amended by adding to the same the words, "for the sum of eight hundred and forty-eight dollars," after the words, "We find herein a verdict for the plaintiff." On return of the said order the court made the amendment asked for.

There is no conflict in the record as to the main facts. It is nowhere denied that the charge of the judge correctly stated the issue between the parties, nor is there any claim made that if the plaintiff were entitled to recover at all he

Opinion of the Court, per PECKHAM, J.

might properly recover any other than the precise sum stated by the court.

The only question in the case now before us arises upon these conceded facts, and it is simply whether the plaintiff shall have the benefit of the verdict of the jury by merely adding to its written portion the amount really agreed upon by them and which it is conceded on all hands the plaintiff was legally entitled to, if entitled to a verdict in his favor at all. It is said that the affidavits of the jurors were obtained *ex parte*, and three days after the verdict was actually rendered, and that to allow such an amendment is to throw open the doors to much loose practice and to bring questions before the court of a nature to require an investigation into the transactions or proceedings of the jury room, which can be determined only by *ex parte* affidavits or statements, and that, in short, to grant such an amendment would be most impolitic and would establish a bad precedent.

In following rules of practice for the due and orderly administration of the law, care should be taken that justice is not smothered by a too slavish adherence to the mere forms and technicalities of procedure. A slight attention to the facts in this case, it seems to us, will give the best and indeed a perfectly conclusive answer to these objections. Here we have an action to recover a certain amount upon contract. There is no element of unliquidated damages in it. The plaintiff is entitled to recover a sum certain, known, conceded, if entitled to recover anything. The only issue in the case is one as to what the contract was, and if not what the plaintiff alleged it to be, then the defendant was entitled to a verdict. This is acquiesced in and conceded by the defendant. The judge so charges, and states the precise sum that the plaintiff is entitled to if he has a verdict in his favor. The jury agree upon a verdict and write it down in favor of the plaintiff, in accordance with the agreement arrived at by them, and they agree upon the sum named by the court. In such a case of absolutely uncontradicted facts, where a certain, definite, conceded amount follows a verdict for the plaintiff as certainly as the

Opinion of the Court, per PECKHAM, J.

night follows the day, it seems to me a mere travesty or mockery of justice to hold that no legal verdict has been arrived at, that the court is powerless to aid, and that the plaintiff must lose the benefit of the trial and the verdict actually agreed upon, and both parties must be put to the expense of proceeding *de novo* to a trial of the cause. Where the conceded facts are such as this case shows, I am quite certain that no bad precedent can be adduced from the court interfering to aid a verdict in regard to the meaning of which there cannot upon the facts be room for two opinions.

It is said that the fixing of the amount is an integral part of a verdict, and that the jury would have had power to have found a verdict for the plaintiff and to have given him a less than the conceded sum due him, if entitled to any verdict.

Even if this should be conceded, it is also true that in such an action as this is, *ex contractu*, the court would, on application, set such a verdict aside as being against or unsupported by the evidence; but here the whole jury unite in saying they meant to and did find a verdict for the full amount, and there is no hint of a denial, or a shadow of a suspicion that this is not the absolute truth. Under such a state of facts to refuse to give effect to the actual verdict of a jury, because in some other case where the facts were different, or not conceded, or were contradicted, a verdict should not be amended, is in my judgment to sacrifice substantial justice to the merest form or ceremony. As has been heretofore said by the late Judge ALLEN, no serious danger can lurk in the practice which may grow up under an exception to the general rule forbidding jurors to impeach their verdicts. "Applications," says that learned judge, in *Dalrymple v. Williams* (63 N. Y. 361), "will be rare, will be made before the judge presiding at the trial and while the whole subject is fresh in the minds of all, and never will be granted, except in cases free from reasonable doubt. Something must always be trusted to the discretion of the judge. Discretion cannot be withheld in all cases, because it may sometimes be abused."

That case bears a close resemblance to this in principle.

Opinion of the Court, per PECKHAM, J.

The action was for fraud, and the foreman of the jury announced as their verdict a general one in favor of the plaintiff against both defendants, and it was so entered. Upon application made thereafter, but on the same day, to the judge holding the circuit, on behalf of one of the defendants, an order to show cause at a day specified, during the same circuit, why the verdict should not be corrected, was granted. The order was based upon the affidavits of all the jurors, stating, in substance, that the verdict, as agreed upon by them, was in favor of defendant Williams and against the other defendant, for the amount named in the verdict entered, and that the announcement of the foreman was made through mistake and inadvertance. The court, upon the hearing of the motion, directed the verdict to be amended so as to conform to the actual finding. In this court the order was upheld, and it was said that "it would be a reproach to the administration of justice if a party could lose the benefit of a trial and a verdict in his favor, by the mere mistake of the foreman of the jury in reporting to the court the result of the deliberations of himself and his fellows." There are one or two differences of fact in the two cases.

In the case at bar the order to show cause was not granted until three days after the rendition of the verdict, while in the case cited the order was granted on the same day. But I see no special virtue or power which is lost to the court by the going down of the sun before the granting of such an order. In the reported case, the fact as to what was the verdict of the jury was shown by the *ex parte* affidavits of the members of it, and that fact was in direct opposition to the verdict as actually given to the court and recorded, and upon which the jury had separated. There was, however, no doubt or contradiction of the fact that such a mistake had been made.

In the case at bar there is just the same utter absence of even a pretense that the jury did not, as a fact, agree upon a verdict for the plaintiff for the full amount claimed, but they mistakenly thought the court would, as a matter of course, fill in the amount when the fact appeared that the jury found a

Opinion of the Court, per PECKHAM, J.

verdict for the plaintiff. Upon the conceded facts there was a simple omission to embody in their written verdict the actual verdict that the jury had agreed to.

This case bears no analogy to either of the cases of *Jackson v. Williamson* (2 T. R. 281), or *Rex v. Woodfall* (5 Burr. 2661). In the first case the issues were as to the value of the vessel taken by the defendants, and witnesses had been sworn in regard to the fact. The action was trespass for the taking of the vessel. The jury actually brought in a verdict for thirty pounds damages, and the plaintiff subsequently produced affidavits from all the jury that they meant to give the plaintiff thirty pounds as damages for seizing and detaining the vessel, over and above the thirty-one pounds for which it had been sold. The court refused to amend the verdict. It was a case where the damages were unliquidated, and any amount could have been agreed upon by the jury, as one of the very issues in the cause was as to the amount of the verdict, even if plaintiff were entitled to one at all. The court merely said it was dangerous practice to interfere in such a case. Very likely it was. In a case where the demand for damages is unliquidated, and the jury merely finds a verdict for the plaintiff and does not fix the amount, perhaps it might be going too far to fix it by affidavits. This is no such case. The sealed verdict, as actually handed in and signed by the jury, fixed really and beyond peradventure the status of the plaintiff, and from such verdict the fact almost followed, as a legal conclusion, that the amount as directed by the court was the amount found by the jury. Certainly, when the written verdict is supplemented by the facts appearing in this case, no reason founded, as it seems to us, in justice and good sense can be given why the amendment asked for should not be allowed.

The verdict in the case of *Rex v. Woodfall* (*supra*), which was an indictment for a libel, was "guilty of printing and publishing only." The court refused to enter any judgment upon it because it was so ambiguous, and ordered a *venire de novo*.

Statement of case.

The power of the court to make the amendment is, I think, decided in the *Dalrymple Case* (*supra*), where the authorities are referred to and commented upon by the court.

I think the court below had the power to make the order it did amending the verdict, and that in exercising its discretion it was guilty of no abuse thereof, and the order should be affirmed, with costs.

All concur except RUGER, Ch. J., dissenting.

Order affirmed.

119	175
129	372

THE PEOPLE ex rel. THOMAS STAPLETON et al., Respondents,
v. GEORGE H. BELL et al., Appellants.

Inspectors of election are simply ministerial officers, and a board of inspectors has no discretionary power to reject the vote of a person who, upon being challenged and upon application of the statutory tests, has shown himself qualified to vote. When this is done the offered vote in legal contemplation is finally received, and must be deposited.

It seems the lawfulness of a vote cannot be determined until it has been received, and an elector's right cannot be annulled without a trial.

In proceedings by mandamus to compel defendants, who were members of a board of inspectors of election, to affix their signatures to the election returns, it appeared that after the closing of the polls the inspectors counted the ballots cast and declared the result, but defendants refused to affix their signatures upon the ground that fraudulent votes were cast by persons who were not themselves registered, but who falsely personating registered voters, upon being challenged, complied with statutory tests. *Held*, that it was the duty of the inspectors to count and return all the votes cast, and of each to attach his signature to the return; and that a peremptory writ was properly granted.

The affidavits presented in opposition to the motion for the writ averred that the fraudulent votes when offered were objected to on the ground that "the persons were challenged and sworn and their answers were unsatisfactory." It was not denied, however, that the challenged voters complied with the statutory requirements. *Held*, that the said averment fell short of an allegation that full answers were not made, but meant simply that while full answers were made they did not satisfy the defendants; and that this did not warrant them, either in denying the rights of the voters, or in refusing to sign the returns.

The opposing affidavits alleged that the questioned "ballots were not received by the board or by a majority thereof." *Held*, that it was not essential that the reception of the ballot of a challenged voter should be

Statement of case.

agreed to by a majority of the board ; that within the meaning of the provisions of the General Election Law (art. 4, tit. 3, § 28, chap. 130, Laws of 1842, which directs that "when the board shall finally have received the ballot of an elector one of the inspectors * * * shall deposit it," the ballot is finally received when the elector has satisfied all the statutory tests, and any inspector may deposit it.
Reported below, 54 Hun, 567.

(Argued January 14, 1889 ; decided January 28, 1889.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made November 26, 1889, which affirmed an order of Special Term granting a peremptory writ of *mandamus*.

The relators and the defendants were the members of the board of inspectors of election appointed for the ninth ward of the city of Troy. The defendants refused to affix their signatures to the election returns made for said election district at the annual election held November 5, 1889, and these proceedings were instituted by the relators to compel them to perform that act. No issue is made as to any material allegation of fact in the moving papers ; but the defendants allege that fraudulent personations of registered voters were made at the polls by non-resident and non-registered persons and such votes were offered and were received, over their objection. They admit that after such persons were challenged they were sworn, but say their "answers were unsatisfactory," and they allege that the "ballots were not received by said board or by a majority thereof."

The peremptory writ of *mandamus* ordered at Special Term directed defendants to sign said returns.

The further material facts are stated in the opinion.

G. B. Wellington for appellants. A board of inspectors is not obliged to receive the ballot of a person not registered who falsely personates a registered voter. (Laws of 1842, chap. 130, §§ 13, 28, 42, 44 ; Code, §§ 279, 299, 301 ; Laws of 1875, chap. 138 ; Laws of 1859, chap. 380 ; Laws of 1880, chap. 576, § 6 ; *Hyde v. Brush*, 34 Conn. 454 ; Laws of 1872, chap. 570 ; McCrary on Elections [3d ed.], §§ 252, 312 ; *People*

Statement of case.

v. *Pease*, 30 Barb. 588; 27 N. Y. 45; *State v. Robb*, 17 Ind. 536; Laws of 1847, chap. 240, § 16; *People v. Wilson*, 62 N. Y. 195, 197; *Goetcheus v. Matthewson*, 61 id. 420; *People v. Boas*, 29 Hun, 378.) Inspectors of election, since the registry acts, have far more discretion than formerly. They are formed into a registry board before election and are then clothed with *quasi* judicial powers. (Laws of 1880, chap. 576, §§ 3, 6; Laws of 1883, chap. 508; *People ex rel. v. Thatcher*, 55 N. Y. 534; *Bd. of Super. v. Davis*, 63 Ill. 405; McCrary on Elections, §§ 539, 541.) This appeal may be heard. (*People v. Phillips*, 67 N. Y. 582; *People ex rel. v. Walker*, 68 id. 412; Laws of 1881, chap. 47, § 3; *People ex rel. v. Keeler*, 99 N. Y. 463.)

R. A. Parmenter for respondents. The refusal by the Republican inspectors of election to sign the returns, after the votes had been canvassed as required by the statute, was wrongful and contumacious. (Laws of 1880, chap. 56.) The defense against the motion for peremptory *mandamus*, as disclosed in the affidavits of the Republican inspectors, shows conclusively that on election day they assumed to exercise judicial functions and powers not conferred upon inspectors of election by the laws of this state. (1 R. S. [7th ed.] 338, § 28; Id. 387, § 22; Id. 384–388; *Ex parte Heath*, 3 Hill, 47; *People ex rel. v. Pease*, 30 Barb. 596; 27 N. Y. 45; *People v. Cook*, 8 id. 67; *Goetcheus v. Matthewson*, 61 id. 420; *Kortz v. Green I. Co.*, 12 Abb. [N. C.] 84; 30 Hun, 217; *People ex rel. v. Wayne Co.*, 12 Abb. [N. C.] 77; *People ex rel. v. Reardon*, 49 Hun, 425–431; *People ex rel. v. Thatcher*, 55 N. Y. 530; *People ex rel. v. McNally*, 9 Abb. [N. C.] 470; *People ex rel. v. Thornton*, 25 Hun, 456–460.) The court may compel the inspectors by *mandamus* to sign the returns. (1 R. S. [7th ed.] 388, 389, §§ 35–42, 44–48.) It is not alleged and does not appear that any person, offering to vote at said polls and who was challenged, refused to answer any question put to him after having first taken the preliminary oath prescribed by the statute. (1 R. S. [7th ed.] 13–15, 386.) If the

appellants on election day had fully discharged their duty there would be no excuse for their neglect to state in their affidavit the precise number of challenges made at the ninth ward poll, and the name given by such persons. (1 R. S. [7th ed.] 387, § 22.) The range of inquiry by inspectors of election has not been enlarged under the registry laws of 1880, which are now in force in the city of Troy. (Laws of 1880, chap. 576, §§ 5, 6; *People v. Pease*, 30 Barb. 593, 596.) The duty which the appellants, as public officers, refused to perform, was of a public nature. *Mandamus* is the proper remedy to command the execution of such public duties. (*People ex rel. v. Daley*, 37 Hun, 466, 467.)

GRAY, J. The record before us shows that the question which it presents has received a careful consideration in the courts below, and we might leave the discussion there, if it were not a question which, as concerning the powers of inspectors of elections in holding state elections, affects the right of suffrage, and, therefore, is of public interest. The precise claim of the appellants amounts to this, that those officers are clothed with a discretionary power to reject the ballot tendered by a proposed elector; notwithstanding he may have satisfied the tests prescribed by law, by taking the oaths and fully answering the questions put to him, if they doubt his identity with the registered elector, whose name he gives at the polls. In other words, that they may act, nevertheless, upon their own private opinions and knowledge. That claim arrogates to them judicial powers, and support for it must be found in the law regulating elections, either in express words, or as implied, from being necessarily incidental to the office and to the proper exercise of its duties.

The right of suffrage is one of the most valuable and sacred rights which the Constitution has conferred upon the citizen of the state. About it have been erected many safeguards, with the object of securing to each qualified elector the fullest and freest exercise of his constitutional privilege, and, also, of obtaining the greatest protection against the perpetration of

Opinion of the Court, per GRAY, J.

frauds at the polls, which shall be consistent with a certainty that every person entitled to vote shall have his ballot received, deposited and counted. It may properly be observed in this connection that, in addition to the legal requisites, the public nature of the proceedings, through which the elector entitles himself to cast a ballot, and the public manner in which he presents himself to cast it at the polls, are features in our elections, which tend to minimize the possibility of false personations and of other fraudulent practices in elections.

I think it would be a far greater menace to the security of this constitutional right, if the law regulating its exercise might prevent the vote of a citizen, duly qualified to cast it, from being received and counted, than that some fraud might be practiced by a false personation. For, in the one case, there would be the disfranchisement of the elector; while, in the other, for the wrong done to the people, or to the individual, penalties and remedies are provided, and tribunals exist for their enforcement against a wrongdoer and for the establishment of the right.

There are no complex features in this case and it can be briefly stated. At the last general election in this state, the two relators and the two defendants composed the board of inspectors of election; the former being the Democratic and the latter the Republican members thereof. After the closing of the polls the inspectors counted the ballots which had been cast, and the results of the counting were thereupon proclaimed. But to the election return, containing a statement of such results, the defendants refused to affix their signatures as required by law.

In opposition to the application of the relators for an order compelling them to sign the return, the defendants objected, in substance, that fraudulent votes were received during the election from persons falsely personating registered voters and who were not themselves registered; that upon their votes being offered their receipt was objected to; the "persons were challenged and sworn and their answers were unsatisfactory;" that said ballots were not received by the board, or by a majority

thereof, but were taken and deposited by the relators in the ballot boxes, contrary to the protest of the defendants. It does not appear, however, that any minutes or record were made of such attempts, or objections; although the affidavit of the defendants states, somewhat indefinitely, that "at least seventy fraudulent votes were offered at the polls." The allegation was not put in issue by any denial and we must take it to be true. The gravity of the offense cannot be overrated and calls for the severest expressions of condemnation. Such practices are as dangerous to the rights of citizens as they are odious; and, when suffered to go unnoticed and unpunished, reflect disgracefully upon the community. If unchecked by punishment the electoral franchise is subjected to further attacks by dishonest partisans, emboldened by past immunity to themselves, or others, to affect the result of elections by fraudulent personations and other devices. But we are confined in our discussion here, to the legal question of what exercise of powers is permitted under the existing laws.

We must assume that the person, whose right to vote was challenged, submitted to all the statutory tests prescribed by the law in such cases, for the appellants concede that he was "sworn" and only allege that his "answers were unsatisfactory." They did not claim that his answers were not full, or that he was disabled by reason of any conviction. Their position is that they had knowledge that persons offered ballots, who were not the registered electors they claimed to be and were not registered at all, and their argument is that, notwithstanding those persons satisfied the statutory tests, such questions are always outstanding for the determination of the board; which only a majority can make.

I must say, that, to my mind, this claim is as unreasonable, as it is absolutely lacking in support in the fundamental, or in statutory law. It is repugnant to fundamental principles and to authority. I may fairly premise what brief discussion I may feel bound to enter upon, in connection with the law regulating elections in this state, with the remark, that if these appellants are right in their contention, then a way is made

possible to perpetrate a great outrage upon the rights of electors. Under the present scheme of non-partisan boards of election inspectors, wherein the principal political parties in the state are intended to have equal representation, by a contumacious refusal of party adherents to sign an election return, based on the pretense that they were not satisfied in their minds that all of the ballots taken were cast by qualified and registered electors, the disfranchisement of all the electors in the election district could be effected. They could prevent the reception of a ballot from a proposed elector, on their theory that a ballot is not finally received until by action of the majority of the board; for they would only have to oppose to the proofs required by the election law and made by the person, their mental convictions that, notwithstanding them, he was not the elector he swore he was. I do not, and cannot think such a result was ever intended, or can be fairly reached upon a consideration of the law. It is inconceivable that any such power should be lodged in election inspectors; or that they should be clothed with a discretion to reject a ballot offered by a proposed elector, whose qualifications, in case of challenge, are proved by the statutory methods.

The Constitution of the state provides that the citizen, fulfilling the stated conditions of age, citizenship and residence, shall be entitled to vote at the election; and it is thereby left to the legislature to enact laws excluding persons from the right of suffrage, who have been convicted of bribery, or infamous crime, and for ascertaining by proper proofs the electors who shall be entitled to exercise that right. The legislature accordingly has enacted laws regulating the holding of elections, and therein have provided, as a prerequisite to the right of the elector to vote, that he should be registered before the day for holding the election. Registration is the method of proof prescribed for ascertaining the electors who are qualified to cast votes and the registers are the lists of such electors. It is a part of the machinery of elections and is a reasonable regulation, which conduces to their orderly conduct and fairness. It is one safeguard against frauds; for it is a

means for furnishing all the electors of the district with the knowledge of what persons will claim the right of voting, a sufficient time in advance of the election for them to act upon it, if necessary. For the present purpose I shall only refer to the chapter of election laws, so far as portions of the law bear upon the phase of the question under consideration.

The inspectors of election, in this particular case, were appointed by the board of police commissioners of the city of Troy, under the provisions of a special law. When appointed they had, of course, such duties to perform as are mentioned in the general laws regulating the holding of elections. When the polls are open the first duty imposed upon the inspectors is for one of their number to receive the ballot tendered; for the law provides (§ 7 of art. 2 of title 4) that each elector shall deliver his ballot "to one of the inspectors in the presence of the board." If, then, he shall be challenged as to his right to vote by an inspector, or by any other person entitled to object, an inspector shall tender him a preliminary oath, to the effect that he will "fully and truly answer" all questions touching his residence and qualifications as an elector. (§ 13.) Thereupon, questions of a certain prescribed nature are to be put to him and all other questions tending to test his qualifications to vote. (§ 14.) If he "shall refuse to take the preliminary oath, when so tendered, or to answer fully any questions which shall be put to him, his vote shall be rejected." (§ 15.) If he shall appear to the board from his answers to be deficient as to qualifications, it must be pointed out to him in what respect. (§ 16.)

In the present case the only claim is that the answers, after the persons were sworn, were not satisfactory. That certainly falls short of an allegation that full and true answers were not made. Of course, what is meant is that, while the answers were full, they did not satisfy, or remove a doubt in the minds of, the defendant inspectors as to the identity of the proposed electors. But, as the statute only requires the oaths and full answers to questions, if the person does that much, these provisions of the law do not warrant the exercise of judicial

Opinion of the Court, per GRAY, J.

powers, under which the inspectors can still assume to deny the right of the proposed elector.

But, further, the law provides (§ 17) that “if the person so offering shall persist in his claim to vote and the challenge shall not be withdrawn,” the inspectors shall administer to him a general oath, in which he states in detail that he possesses all the constitutional and legal qualifications. This second, or general, oath is a clear indication of a lack of any discretionary power in inspectors to reject the vote of a person, even if he has failed to satisfy them as to his qualifications under the first oath prescribed. And it is provided with respect to this latter oath (§ 19) that “if any person shall refuse to take the oath so tendered, his vote shall be rejected.” This is significant language, for it is equal to saying that if he does take the oath his vote shall be received. I think that, plainly enough, these provisions, which have been referred to, in defining the cases, where a vote shall be rejected, impliedly exclude any other case and deprive the inspectors of any discretion in the premises. Article 3 of title 3, treats of the duties of the board of inspectors and I find nothing there, from which any such power can be implied, as is here claimed. It is there made the duty of each inspector to challenge every person offering to vote, whom he shall know or suspect not to be duly qualified as an elector. (§ 31.) But, when he has done so, he cannot do more than put in operation the test system or machinery described. And the statute makes it the inspectors’ duty to keep a minute of their proceedings, in respect to the challenging and administering of oaths, and to make return of it; but that does not appear to have been done here either. (§ 22.) But a point is made upon the wording of section 28 of the third article of this general election law. It reads that “when the board shall have finally received the ballot of an elector” one of the inspectors shall deposit it, etc., and it is argued that to be “finally received by the board” its reception must be agreed to by a majority of the members. The argument does not seem to me a sound one. The board has no discretion to reject the vote of a person who has satisfied the

Opinion of the Court, per GRAY, J.

statutory tests, and when that is done, his vote must be deposited and that is the time when, in legal contemplation, it is finally received. The language of the section is divested of its technical, or literal, meaning by force and operation of the context and of the provisions in *pari materia*, which support and give reason for its existence. Where a voter is challenged, there are several steps to be taken and things to be done by the inspectors, as well as by the voter, and which the statute had previously defined and commanded; so "finally" must be taken, obviously, to refer to the conclusion of the proceedings preliminary to the establishment of the voter's right to have his ballot received and deposited. In mentioning the "board" this section cannot be deemed to indicate united, or majority action, if we are right in saying that they are ministerial officers, without the power of judging and deciding on their own opinions, when the voter has complied with the prescribed tests of the election law. Any inspector can deposit the ballot and it is received, in legal contemplation, by the board of inspectors when, after the elector has delivered his ballot to one of the inspectors, he has overcome a challenge by satisfying the statutory tests. The inspector has held the ballot delivered to him and after the tests are concluded, it is then legally deemed to be received. And how? Why by force of the provisions of the act, as Judge DENIO says in *People ex rel. v. Pease* (27 N.Y. 45). If anything was left by the law to the judgment of inspectors, then there would be some force in the argument that they, or a majority of them, should determine by vote upon the rights of the proposed elector. But to say that the right of the elector to cast a ballot is subject to board action is equivalent to saying that they have power to decide upon the evidence as to the lawfulness of the vote. That cannot be so. That would permit of an elector's rights being adjudged away and himself disfranchised, and on only such evidence as the statute prescribes. The lawfulness of a vote cannot be determined until it has been received, and an elector's rights cannot be annulled without a trial, where he may have an opportunity of bringing forward his proofs

and having them passed upon in a proper way and by a proper tribunal. To hold any other doctrine we would have to disregard the spirit of our laws and the fundamental idea of an electoral franchise. As was said by Mr. Justice ALLEN, who delivered the opinion at General Term in *People ex rel. v. Pease* (30 Barb. 588): "They cannot summon witnesses or impanel a jury or give the party interested a hearing. They can examine the proposed elector under oath, and there their power and means of judicial investigation cease." That this is the general sense with respect to this language is further illustrated by a reference to the "Election Code," a compilation of election laws, made under the authority of a concurrent resolution of the legislature, by the secretary of state. In section 704 it is said "when finally received by the board, either without challenge or after a challenge has been so disposed of as to authorize the person offering the ballot to vote, it is required to be deposited by one of the inspectors without being opened, etc." This direction does not contemplate action as a board, literally, for, if there is no challenge, certainly no such action would be called for. Then, again, it speaks of a challenge being disposed of so as to authorize the person to vote, and says that one of the inspectors is required to deposit the ballot. Such language is indicative of a legal duty or obligation, and not of an exercise of discretion, and is one which any inspector may perform. I do not think the doctrine ought to receive encouragement from this or any other court.

I think we cannot hold otherwise as to inspectors of elections than that they are, under the provisions of the election law, made ministerial officers wholly, for their duties are pointed out by the law definitely. They are only officers to execute the law in a prescribed and definite way, and to whom no latitude is allowed, when the proposed elector satisfies the statutory demands upon him for oaths and answers to certain questions. They are bound to an exact obedience of the particular commands which the law has laid upon them as its officers, and they may not act on their own opinions or knowledge. The duty of an inspector is discharged when he

has required the challenged voter to submit to the tests prescribed. In support of the view that inspectors of election act ministerially and not judicially in holding elections and making returns, we have ample authority. As far back as the case of *Ashby v. White* (8 State Trials, 89, 130), Lord Chief Justice HOLT's opinion was given upon the nature of a returning officer's office. That officer was a person to whom the instrument, under which the election was immediately held, was directed and who also was to make the return as to the vote. (Stephens on Elections, 74.) A majority of the lords in reversing the King's Bench, which had sustained the action of the returning officer in rejecting a vote, agreed with the opinion of Lord HOLT as to the want of judicial capacity in a returning officer. It was held (p. 130) "that the officer is only ministerial in this case, and not a judge, nor acting in the judicial capacity, is most plain. His business is only to execute the precept to assemble the electors, to make the election by receiving their votes, computing their numbers, declaring the election and returning the persons elected."

In *People ex rel. v. Pease* (27 N.Y. 45) the judges were unanimous on the point that inspectors acted ministerially; DENIO, J., who delivered a dissenting opinion on other questions in the case, disclaiming any reliance upon the judicial character of the inspectors, and remarking that "if the inspector performs his duty by tendering and administering both oaths, the voter does not deposit his ballot by the permission or sufferance of the inspectors in any legal sense, but by the provisions of the act." Judge SELDEN carefully discusses the question and reviews authorities, and I think his views are most pertinent here. He said that inspectors "are required to act upon the evidence which the statute prescribes, and have no judicial power to pass upon the question of its truth or falsehood; nor can they act upon their own opinion or knowledge." The registry act was not in existence when that case arose, but Judge SELDEN took occasion to say, with reference to it, that (p. 69) "if it had been it would not have changed the aspect of the present question. Its only effect in this respect is to

Opinion of the Court, per GRAY, J.

require two oaths instead of one, making the oath equally conclusive in each case." And in *Goetcheus v. Matthewson* (61 N. Y. 420) the Commission of Appeals reaffirmed the doctrine of the ministerial nature of the inspector's office.

Judge COOLEY, in his work on Constitutional Limitations (§ 617), treating the general subject of the elector's rights, says that "the oath is the conclusive evidence on which the inspectors are to act and they are not at liberty to refuse to administer it, or to refuse the vote after the oath has been taken. They are only ministerial officers in such a case and have no discretion but to obey the law and receive the vote." He refers in support of his propositions to the *People ex rel. v. Pease* and to decisions in several other states.

Practically, the law leaves it to the conscience of the person offering to vote to decide whether he can or will do so, when his right is challenged. The inspectors cannot do more than to make use of the machinery provided by the law to test the voter's legal qualifications, and they cannot decide upon the truth, or falsity, of the answers to their questions. The law provides for the punishment of a person who falsely personates a registered voter, and the proposed elector, who is challenged for that cause, if he persists in his attempt to vote, may accomplish his purpose, but at the peril consequent upon false swearing and of false personation.

If, with all the safeguards with which popular elections are legally and naturally surrounded, frauds are perpetrated, the tribunals are open, and laws and a system of procedure exist, for the punishment of the offenders and for the rectification of consequent errors, in behalf of an individual whose legal rights are affected; and legislative bodies are judges as to the qualifications, returns and elections of their members. The election return, or certificate, is not a conclusive proof of the right of a person to the office. It is nothing more than evidence of the right, and, like all other proof, may be the subject of inquiry and of disproof. It is the statement of the whole number of ballots taken for each candidate for office, and that is its whole probative force, in an inquiry competently

Statement of case.

instituted with respect to the right of the person claiming office under the election returns. It is only *prima facie* evidence, and may be impeached and set aside for errors and frauds. (*People ex rel. v. Thacher*, 55 N. Y. 525.) ANDREWS, J., said in that case, that it was "the disposition of the courts in this state, in election cases, to look through the formal evidence of the right to the right itself and to set aside the return of election officers when necessary to promote the ends of justice."

If a person claiming the right to cast his ballot shows himself to be qualified to do so, by the application of statutory tests, he should not be deprived of that right by any action of the authorities, state or local. Ample means are provided for holding him for punishment, if believed and charged to be guilty of a violation of the law, and ample means exist for the rectification of the result affected by his acts. It follows that all votes cast must be counted and returned, and the signature by every inspector to the certificate containing the statement required by law, is obligatory upon him.

I have discussed this appeal at some length, but the public nature of the question is my warrant for doing so.

The order appealed from should be affirmed, but without costs.

Ali concur.

Order affirmed.

ANNA M. DOBBINS, as Administratrix, etc., Respondent, v.
WALSTON H. BROWN et al., Appellants.

The degree of care required of an employer in protecting his employees from injury, is the adoption of all reasonable means and precautions to provide for their safety while in the performance of their work.

Neglect, on the part of the employer, to exercise such care, must be proved by direct evidence or by proof of facts from which the inference of negligence can be legitimately drawn by the jury.

The mere fact that an accident occurred which caused an injury is not generally of itself sufficient to authorize an inference of negligence. In an action to recover damages for the death of D., plaintiff's intestate a servant in defendants' employ, alleged to have been caused by defective

119	188
123	644
119	188
124	495
124	658
119	188
128	107
119	188
142	34

Statement of case.

apparatus provided by the latter it appeared that D.'s death was caused by a fall from a bucket, which was being lowered in a shaft to convey workmen to a tunnel, their place of labor. The only survivor of the accident testified, that after the bucket got about half way down the shaft, something came from above and knocked him out of it. After the accident the cable supporting the bucket and dummy-yoke was found to be broken at a point above the bucket, where a chain connected with the cable, and a shoulder had been placed for the support of the dummy-yoke when in position; the dummy-yoke broken, with the bucket and a portion of the chain, were found lying together at the bottom of the shaft. There was no evidence but that similar apparatus and appliances were generally in use in deep shafts for mining purposes in this country, and in some instances it appeared they were required by law to be used. There was no proof of any defect in the plan or structure of the apparatus used, or that it was not well constructed. The court charged that the jury might infer that the accident occurred from the accidental stoppage of the dummy-yoke or follower at some point in the course of its descent, and its sudden fall thereafter from a great distance upon the bucket. *Held*, error; that the evidence was insufficient to support such an inference; also, that it was for plaintiff to show how the accident occurred, and to prove negligence of defendants in respect to some matter which caused it; and that the evidence failed to show this.

(Argued January 14, 1890; decided January 28, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 14, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

E. T. Lovatt for appellants. There was no negligence shown on the part of the defendants. (*Stringham v. Hilton*, 111 N. Y. 188; *Burke v. Witherbee*, 98 id. 562; *March v. Chickering*, 101 id. 401; *Probst v. Delamater*, 100 id. 272; *Hickey v. Taaffe*, 105 id. 26; *Devlin v. Smith*, 89 id. 470; *Fuller v. Jewett*, 80 id. 46; *Painton v. N. C. R. R. Co.*, 83 id. 7; *Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 id. 546; *Jones v. N. Y. C. & H. R. R. Co.*, 22 Hun, 286; *Sheehan v. N. Y. C. & H.*

Statement of case.

R. R. R. Co., 91 N. Y. 332; *Ford v. Lyons*, 41 Hun, 515; *Warner v. E. R. Co.*, 39 N. Y. 468; *Coppins v. N. Y. C. & H. R. R. Co.*, 18 W. D. 416; *Salters v. D. & H. C. Co.*, 3 Hun, 338; *Bohn v. Havemeyer*, 114 N. Y. 296, 297; *Buckley v. G. P., etc., Co.*, 113 id. 540; *Slater v. Jewett*, 85 id. 61; (*Clark v. Baines*, 37 id. 389.) There was no proof of absence of contributory negligence on the part of deceased. (*Cahill v. Hilton*, 106 N. Y. 512; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 id. 330; *Hale v. Smith*, 78 id. 480; *Warner v. N. Y. & C. R. R. Co.*, 44 id. 466; *Hart v. H. R. B. Co.*, 84 id. 57; *Shaw v. Sheldon*, 103 id. 668.) Where a servant enters upon an employment, from its nature necessarily hazardous, he assumes the usual risks and perils of the service, and also those which are known to him, or which are apparent to ordinary observation. (*Gibson v. E. R. Co.*, 63 N. Y. 449; *DeForest v. Jewett*, 88 id. 264; *Owen v. N. Y. C. R. R. Co.*, 1 Lans. 108; *Shaw v. Sheldon*, 103 N. Y. 667; *McEnany v. Kyle*, 8 N. Y. S. R. 358; *Loray v. Hall*, Id. 799; *Monaghan v. N. Y. C. R. R. Co.*, 9 id. 674; *Goodrich v. N. Y. C. R. R. Co.*, 3 id. 774; *Hickey v. Taaffe*, 105 N. Y. 26; *Kelly v. C. G. Co.*, 17 Wkly. Dig. 408; *Appel v. B., N. Y. & P. Co.*, 111 N. Y. 550; *Buckley v. G. P. Co.*, 113 id. 545; *Bohn v. Havermeyer*, 114 id. 296, 297; *Sweeny v. B. & J. E. Co.*, 101 id. 520; *Clark v. Barnes*, 37 Hun, 289; *Haas v. B., N. Y. & P. R. R. Co.*, 47 id. 145; *Evans v. L. S. & M. S. R. R. Co.*, 12 id. 289; *Williams v. D., L. & W. R. R. Co.*, 39 id. 432; *Kelry v. S. S., etc., Co.*, 20 Wkly. Dig. 192; *Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 562; *Gibson v. Erie R. Co.*, 63 id. 448; *Loonan v. Brockway*, 3 Robt. 74; *Jones v. Rood*, 8 J. & S. 248; *Desmond v. Rose*, 14 id. 569; *Sammon v. N. Y. & H. R. R. Co.*, 62 N. Y. 251; *Glendenning v. Shay*, 22 Hun, 78; *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 520-532.) The fact that the machinery failed to work properly did not show that it was unfit for use, no accident having occurred to it before, and no defect being visible or ascertainable. (*Marsh v. Chickering*, 101 N. Y. 401; *Curran v. W. C. & M. Co.*, 36 id. 103; *Cordell v. N. Y. C. & H. R. R. R. Co.*, 75 id. 330; *Terry v. N.*

Statement of case.

Y. C. R. R. Co., 22 Barb. 574; *Searles v. M. R. G. Co.*, 101 N. Y. 662; *Laflin v. B. & S. R. R. Co.*, 106 id. 136.) Defendants having done all they could in regard to the furnishing of appliances, and having furnished a competent foreman, engineer, and topman and other competent employes, any failure of the topman to perform his duties, which resulted in this accident, could not be attributed to the defendants, but must be charged against the co-servant. (*Werner v. E. R. Co.*, 39 N. Y. 468; *Samonon v. N. Y. & H. R. R. Co.*, 62 id. 256; *Malone v. Hathaway*, 64 id. 5; *Coppins v. N. Y. C. & H. R. R. R. Co.*, 25 Wkly. Dig. 416.) The motion for a non-suit should have been granted, as there was no foundation laid at the trial upon which the jury could fix a charge of negligence on the part of the defendants. (*Burke v. Witherbee*, 98 N. Y. 567; *Laflin v. B. & S. R. R. Co.*, 106 id. 137; *Dwight v. G. L. Ins. Co.*, 103 id. 343; *Cordell v. N. Y. C. & H. R. R. R. Co.*, 75 id. 330; *Deyo v. N. Y. C. R. R. Co.*, 34 id. 9; *Coppins v. N. Y. C. & H. R. R. R. Co.*, 50 id. 2, 6.)

J. Van Vechten Olcott for respondent. It was defendants' duty to provide safe means of entry into and exit from the place where their employes were compelled to go, and their failure so to do was negligence. (*Stringham v. Stewart*, 100 N. Y. 516; *Stringham v. Hilton*, 111 id. 188; *Slater v. Jewett*, 85 id. 61-67; *Laning v. N. Y. C. R. R. Co.*, 49 id. 521-532; *Kirkpatrick v. N. Y. C. R. R. Co.*, 79 id. 240; *Booth v. B. & A. R. R. Co.*, 73 id. 38-41; *Painton v. N. C. R. R. Co.*, 83 id. 7.) Plaintiff is not chargeable with knowledge of the danger of this device. He was justified in relying upon the care of his employer and to rest in the assurance that proper care had been taken to insure his safety. (*Kain v. Smith*, 89 N. Y. 375; *Newson v. N. Y. R. R. Co.*, 29 N. Y. 383; *Mackay v. N. Y. C. R. R. Co.*, 35 N. Y. 75.) Plaintiff proved that the defendants failed to provide a reasonable safe appliance with which to do the work assigned him; that the accident was caused in such a

Opinion of the Court, per RUGER, Ch. J.

manner that the cause was not a risk that the servant was bound to take into consideration in his employment; and that there was no contributory negligence on his part, and, therefore, the motion to dismiss the complaint was properly denied. (*Tollman v. S. B. & N. Y. R. R. Co.*, 98 N. Y. 198, 203; *Boardman v. Brown*, 44 Hun, 336; *Burke v. Witherbee*, 98 N. Y. 563.) The question as to whether the appliances used are proper and safe is for the jury, if there is contradictory evidence on that point. (*Flike v. B. & A. R. R. Co.*, 53 N. Y. 549; *Cone v. D., L. & W. R. R. Co.*, 81 id. 206.) The questions of fact depending upon conflicting evidence were properly submitted to the jury. (Code Civ. Pro. §§ 1337, 1338; *Hewlett v. Elmer*, 103 N. Y. 156, 165; *Vermilye v. Palmer*, 52 id. 471; *Matter of Bull*, 111 id. 624, 629; *Parkhurst v. Berdell*, 110 id. 386; 15 Civ. Pro. Rep. 366; *Bassett v. Wheeler*, 84 N. Y. 466.) Even though the motion for a nonsuit was improperly denied when it was made at the close of plaintiff's case, the defendants by the testimony of the witness Church have supplied any omissions. (*Painton v. N. C. R. R. Co.*, 83 N. Y. 7.)

RUGER, Ch. J. We are of the opinion that the evidence of negligence, on the part of the defendants, in the case was insufficient to support a verdict against them. The action was brought for the purpose of recovering damages for the death of plaintiff's intestate, who was a servant in the employ of the defendants, and was alleged to have been injured by a fall from a bucket being lowered in a shaft, some four hundred feet deep, for the purpose of conveying workmen to a tunnel, the place of their labor. Such an action is supportable only upon the theory of personal negligence on the part of the employer, resulting in the injury complained of. The degree of care required of an employer in protecting his employes from injury has been stated to be the adoption of all reasonable means and precautions to provide for the safety of his servants while in the performance of their work. (*Corcoran v. Holbrook*, 59 N. Y. 517; *Pantzar v. Tilly Foster Iron Mining*

Opinion of the Court, per RUGER, Ch. J.

Co., 99 id. 368.) The omission to use such care has been held to be negligence, rendering the employer liable for damages occasioned by it; but such neglect must be proved, either by direct evidence or the proof of facts from which the inference of negligence can be legitimately drawn by the jury. It cannot be supported by mere conjecture or surmise, but must be made referable by the proof to some specific cause or defect. It has been held that the mere fact that an accident occurred which caused an injury, is not generally, of itself, sufficient to authorize an inference of negligence against a defendant. (*Curtis v. R. & S. R. R. Co.*, 18 N. Y. 534.)

The negligence alleged in the complaint is that the machinery, appliances and apparatus used by the defendants in their work for communication between the surface of the earth and the bottom of the shaft, were unsafe, defective and insecure, and the specification under this charge was that the dummy-yoke, follower or frame used to steady the bucket or car while traversing the shaft, was so defective, unsafe and insecure, and the defendants were so negligent in securing and watching the same, that said dummy-yoke or frame fell upon the said intestate and others who were descending the shaft, and killed four out of five of its occupants, among whom was the plaintiff's intestate.

The proof does not support this allegation. It appears that there was but one survivor of the catastrophe, and he was, therefore, the only eye witness of the transaction, but was entirely unable to state how it occurred. His testimony was that some time after the bucket got about half way down the shaft something came from above and knocked him out of it, and this constituted the only direct evidence as to the manner in which the accident occurred. Other evidence was to the effect that after the accident the cable supporting the bucket and dummy-yoke was found to be broken at a point about twenty feet above the bucket, at a place where a chain connected with the cable, and a shoulder had been placed for the support of the dummy-yoke when in position, and the dummy-yoke, broken in three pieces, with the bucket and a portion

Opinion of the Court, per RUGER, Ch. J.

of the chain, were found lying together at the bottom of the shaft.

There was no evidence but that apparatus and appliances, similar to the one in question, were generally in use in deep shafts for mining purposes in this country, and in some instances it appeared they were required to be used by the statutes of the states in which they were employed. No proof was given of any defect in the plan or structure of the machinery or appliances, constituting the apparatus used in elevating and lowering the bucket in question, or that it was not well constructed of good materials in accordance with the plans generally followed in manufacturing similar apparatus. The trial court in its charge to the jury authorized them to infer that the accident might have occurred from the accidental stoppage of the dummy-yoke, or follower, at some point in the course of its descent and its sudden fall thereafter from a great distance upon the bucket. We think that court erred in submitting this theory to the jury as there was no sufficient evidence to support it. There was no evidence to show but that the dummy, or follower, immediately followed the bucket in its descent as it was designed to do, or of the existence of any cause which might have prevented it or interrupted its descent. There was no proof that the follower had not always operated as it was designed to do, or that there was any obstruction which would on this occasion have been likely to impede its natural operation. Any inference that the accident happened in the manner suggested would, it seems to us, have been substituting conjecture for proof and violated the rule requiring proof always to be made the basis of a recovery.

There were other ways in which the accident might have occurred, as by the fall of some detached rock, dirt or other body from the surface or shaft upon the bucket or follower, or some sudden jerk or strain upon the cable, which caused it to break, or from many other unexpected and unforeseen causes, which are not sufficiently negatived or contradicted by the evidence. It is quite improbable that the deaths were

Statement of case.

caused by the contact of a body falling directly upon them, but rather by the concussion of the fall from a great height to the bottom of the shaft. Whatever might have been the cause of death, it was for the plaintiff to show how it occurred. The burden of proof lay upon her to establish the liability of the defendants and to do this she was bound to show affirmatively, not only the absence of contributory negligence on the part of her intestate, but the negligence of the defendants in respect to some matter which caused the injury complained of. The former may be legitimately inferred from the evidence, but with respect to the latter we have been unable to discover sufficient evidence in the case, and the judgments of the courts below should, therefore, be reversed and a new trial ordered with costs to abide the event.

All concur.

Judgment reversed.

THE CITIZENS' NATIONAL BANK OF DAVENPORT, IOWA, Respondent, v. THE IMPORTERS AND TRADERS' BANK, OF NEW YORK, Appellant.

119	195
126	327

Where one bank has funds on deposit with another, the law implies a contract between them that the latter shall pay the amount standing to the credit of the former, upon and according to its drafts or order, and a failure so to pay, is a breach of contract, for which the debtor bank is legally liable; the remedy of the depositor is not confined to a suit for the whole deposit.

A forged indorsement does not pass title to commercial paper, negotiable only by indorsement, and payment by the drawee of a draft so indorsed although in good faith, is, as to the true owner, no payment.

Plaintiff's complaint alleged, in substance, the making and delivery by it to W. & Co. of certain drafts, which were set forth, drawn upon defendant, with whom it had sufficient funds on deposit to pay the drafts, and made payable to the order of W. & Co., the indorsement of the drafts by the payees, a presentation and demand for payment, defendant's refusal to pay and protest for non-payment, and that, by reason of the non-payment, plaintiff was compelled to pay the amount of the drafts and take them up. The answer set up simply payment. *Held*, that while the complaint was technically open to criticism, yet it contained a plain state-

Statement of case.

ment of the facts from which, as a legal conclusion, plaintiff had a right to recover for a breach of defendant's implied contract to pay out plaintiff's funds, and as defendant could in nowise have been misled, a recovery for that cause of action was proper.

It seems the averment that plaintiff repaid the money received for the drafts and took them up, was immaterial to establish a cause of action; the repayment simply established the amount of damages.

It appeared that W. & Co. purchased from plaintiff the drafts, which, after indorsing, they delivered to their bookkeeper to be forwarded to certain of their creditors. The bookkeeper erased the indorsements, forged others and used the drafts for his own purposes; they were finally presented by another bank to and paid by defendant. After the forgeries were discovered, and upon the return of the drafts to plaintiff, W. & Co. demanded and obtained them, and on presentation, defendant refused payment, on the ground that they had been paid. Plaintiff repaid to W. & Co., the amount paid for them. *Held*, that plaintiff was entitled to recover the amount of the drafts.

Defendant offered to prove that before plaintiff paid back to W. & Co. the amount of the dishonored drafts, that firm had settled with their bookkeeper, and for his indebtedness to them, including the appropriation of the drafts, had received certain property. This was objected to and excluded. *Held*, no error; that this evidence was not admissible under the pleadings; also, if an answer had been allowed, it would not have shown that W. & Co. had been paid.

Reported below, 44 Hun, 386.

(Argued January 15, 1890; decided January 28, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 10, 1888, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court.

This action was brought by the plaintiff, a bank in the state of Iowa, to recover against the defendant, a bank in New York city, on the ground of the non-payment of certain drafts or bills of exchange, which plaintiff had drawn upon the defendant in favor and to the order of Wadsworth & Co. The complaint alleges, in ten counts, the making and delivery of the drafts, their indorsement by the payees, a presentation and demand for payment, the defendant's refusal and the protest for non-payment thereof; that at the time of defendant's refusal to pay the plaintiff had sufficient funds on deposit

Statement of case.

with defendant wherewith to pay the drafts, and that by reason of the non-payment the plaintiff has been compelled to pay the amount of the drafts, and to take them up. The drafts were similar in form ; of one of them the following is a copy :

“\$3,269.65. State of Iowa. No. 232245.

“The Citizens’ National Bank of Davenport.

“DAVENPORT, *April 7, 1884.*

“Pay this first of exchange, second unpaid, to the order of W. C. Wadsworth & Co. thirty-two hundred and sixty-nine 65-100 dollars, in current funds.

“E. S. CARL, *Cashier.*

“To Importers and Traders’ National Bank, }
“New York.” }

The defense set up in the answer was the payment, of the described paper to the Fourth National Bank, as the holder thereof through various indorsements. The answer admitted the possession by defendant of sufficient deposits from the plaintiff to pay all of the paper. Upon the trial these facts were developed. W. & Co. bought these drafts from the plaintiff bank, in order to remit to their creditors in payment of sundry accounts, and, having appropriately indorsed them, delivered them to their bookkeeper to be sent off. He, however, erased the indorsements, forged others, and used the paper for his own purposes. It thereby came into other hands, and through the Fourth National Bank was presented to and paid by the defendant. The plaintiff’s proofs establishing the forgeries, were undisputed. After the forgeries were discovered and upon the return to the plaintiff of the drafts from the defendant, W. & Co. demanded and obtained them back from the plaintiff and indorsed them to one W. for collection. He was refused payment of them by the defendant, on their presentation ; the defendant’s cashier placing the refusal on the ground of their previous payment. W. then returned them to the payees, W. & Co. The plaintiff repaid to W. & Co. the moneys wherewith the drafts had been purchased by them, and then commenced this action.

Statement of case.

A. R. Dyett for appellant. The court erred in sustaining plaintiff's objection to the questions put to William C. Wadsworth by defendant's counsel. (*Morris v. Rexford*, 18 N. Y. 522; *Rodermund v. Clark*, 46 id. 354; *Bank of Beloit v. Beal*, 34 id. 473; *Schiffer v. Dietz*, 83 id. 300; *Fowler v. B. S. Bank*, 113 id. 450; *Butler v. Miller*, 1 id. 496; *Littlefield v. Brown*, 1 Wend. 398; 11 id. 467; *Moller v. Tuska*, 87 N. Y. 166; *Comstock v. U. S. L. Ins. Co.*, 4 Hun, 783.) The court erred in refusing to dismiss the complaint and in directing a verdict for the plaintiff. (*Freund v. I. & T. Nat. Bank*, 76 N. Y. 352, 355; *Southwick v. M. Nat. Bank*, 81 id. 432; *N. R. Bank v. Aymars*, 2 Hill, 262; 16 N. Y. 137, 138.)

George Wadsworth for respondent. The plaintiff, as depositor, had the right to draw its checks against its deposit with the defendant for such sums as it chose, and was not bound to draw for the whole amount standing to its credit; it was the duty of the defendant to pay such checks, and upon its refusal to pay them, when presented by the payees, the depositor can maintain an action to recover so much of its deposit as the checks amount to. (*Viets v. U. N. Bank*, 101 N. Y. 563.) The cause of action arises upon the demand and refusal to pay; it is not necessary for the drawer to refund the money to the drawee. (*Rector v. Higgins*, 48 N. Y. 532; 2 Parson on Notes & Bills, 62, 63, 64.) The erasure of the names of the original indorsees, and the insertion of other names was a forgery and vitiated the whole instrument. (Code of Iowa, § 3917; Penal Code, § 509, subs. 2, 6; Chitty on Bills, 781; 2 Parsons on Notes & Bills, 584, chap. 15, § 2.) The fact that defendant paid the checks upon forged indorsements is no defense to this action. (*Frank v. C. Nat. Bank*, 84 N. Y. 209; *Godin v. Bank of Commonwealth*, 6 Duer, 76; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Weissen, v. Denison*, 10 N. Y. 69; *Morgan v. Bank*, 11 id. 404; *Welsh v. Germ. Am. Bank*, 73 id. 424; *Thomson v. Bank of B. N. A.*, 82 id. 1; *Clews v. Nat. Bank*, 89 id. 418; *Com. Ex.*

Opinion of the Court, per GRAY, J.

Bank v. Nassau Bank, 91 id. 74; *Bank of B. N. A. v. M. N. B.*, Id. 106; *Frank v. Lanier*, Id. 112; *Crawford v. W. S. Bank*, 100 id. 50; *Weyerhauser v. Dun*, 100 id. 150; *Sims v. U. S. T. Co.*, 103 id. 472, 476; *Craighead v. Peterson*, 72 id. 279; *C. Nat. Bank v. N. R. Bank*, 44 Hun, 114; *People v. Bank of North America*, 75 N. Y. 547.) The defendant failed to establish its defense in that it did not prove that W. C. Wadsworth & Co. indorsed these checks, either to Bennett or Rumsey, and it also failed to prove the genuineness of the indorsements of Jno. W. Rumsey & Co. or of any of the subsequent indorseees. (Code Civ. Pro. § 522; *Arthur v. H. F. Ins. Co.*, 78 N. Y. 462; *Freund v. I. & T. Nat. Bank*, 76 id. 352; *C. N. Bank v. I & T. Nat. Bank*, 44 Hun, 389, 392.) The exceptions to the ruling on the questions asked of W. C. Wadsworth, as to his dealings with Bennett, are not well taken. (*Boardman v. Davidson*, 7 Abb. [N. S.] 439; *Rome Ex. Bank v. Eames*, 1 Keyes, 588; *Ritchmeyer v. Remsen*, 38 N. Y. 206; *Ryder v. Jenny*, 2 Robt. 56; Code Civ. Pro. § 3251; sub. 5; 19 N. Y. S. R. 430.)

GRAY, J. The form of the complaint is perhaps, technically, open to a criticism that it seems to ground the action upon the drafts themselves, and, therefore, makes it one to recover plaintiff's deposits. Such a cause of action has not accrued to the plaintiff at all, upon the facts in this record. The cause of action, which is stated to have accrued to plaintiff, was for the refusal of the defendant to honor the plaintiff's drafts upon it. The contract between the two banks, as implied by law, was that the amount of funds standing to the credit of the plaintiff bank on the defendant's books should be held and paid out upon and according to the plaintiff's checks or order, and a failure to obey an order for their payment was a breach of the defendant's duty and contract, for which it is legally liable, either in tort, or upon the contract. In this case the breach of contract occurred upon the refusal to pay the plaintiff's drafts upon its funds to the order of the payees named, and a cause of action then arose in plaintiff's favor. But this criticism upon

Opinion of the Court, per GRAY, J.

the form of the complaint is not serious in its results, for the pleading may be upheld and the action maintained as one simply for the breach of the defendant's contract to pay the drafts of the plaintiff. The Code of Civil Procedure requires that a complaint shall contain a plain and concise statement of the facts constituting the cause of action, and that requisite is met here sufficiently. The pleading, after describing the drafts and stating the proceedings up to the protest for non-payment, alleges "that at the time said defendant so neglected and refused to pay, etc., plaintiff had sufficient money or funds on deposit with the defendant to its credit and subject to its draft or order wherewith to pay, etc., and that by reason of the non-payment the plaintiff has been compelled to pay and has paid the amount, etc." That is a plain statement of the facts from which, as a legal conclusion, the plaintiff's legal right to recover is deducible, and the defendant could in no wise be misled. This seems especially true; for by its answer the defendant admits that it was indebted to the plaintiff for moneys theretofore deposited subject to its draft, check, or order, in more than a sufficient sum to pay all the drafts; and it relies, to defeat the action, upon the defense of payment only.

As to the cause of action, I think it clearly one which did accrue to and became enforceable by the plaintiff. In the first place, we must regard the paper as never having been paid by defendant to the order of the plaintiff, for the rule is well and long established that a forged indorsement does not pass a title to commercial paper, negotiable only by indorsement, and payment by the drawee, although in good faith, of a draft so affected, is no payment at all as to the true owner. (*Graves v. American Exchange Bank*, 17 N. Y. 205.) It was the defendant's business to see to it that its depositor's moneys were expended according to its directions, and every expenditure was at the defendant's risk of the direction being valid and of the indorsement conveying title to the holder being genuine. (*Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74, 81.)

The defendant made no attempt to disprove the plaintiff's evidence as to the forged indorsements of the payees' names and orders, and the forgeries must be taken as proved. Forgeries may consist, in the legal sense, of any fraudulent alterations of paper by which another may be defrauded. (Chitty on Bills 781.) So, we have no payment by the defendant of these drafts proved and the question becomes solely one upon its objection to the right of the plaintiff to maintain this action for non-payment by the defendant to third persons of the drafts. Its counsel says the proper remedy was to sue for the deposits. That is not so. Here the cause of action is the breach of the implied and conceded contract to pay out the plaintiff's funds according to its drafts and order. The remedy was to sue for the breach and recover against the defendant in an amount equal to the amount of the plaintiff's drafts, which were refused payment. That the plaintiff repaid to W. & Co. the moneys they had paid to it, to obtain these drafts, and, thereby, reacquired the paper is wholly immaterial, as long as the action is not upon the drafts themselves. If the plaintiff was suing upon this paper through a derivative title from W. & Co., it would be a very different question, indeed. But the payment back of the moneys to W. & Co. established the damage and its extent, to which the defendant's act subjected the plaintiff. The acquisition thereby, and the holding and exhibition of the dishonored drafts are evidences of the facts constituting the cause of action. In recent cases this court has passed upon similar questions as to the rights of drawers of checks; to which we may in fact, liken this paper. In *Bank of British North America v. Mercantile Nat. Bank* (91 N. Y. 111), the case shows the payment by the defendant bank of a check given by the plaintiff bank to H., and made payable to her order. Her indorsement was forged, and the money collected by another person. When the facts of the forgery and of the payment were discovered, the action was commenced. It is true the only defense was the statute of limitations, but EARL, J., in his opinion, which was concurred in by all the judges, said: "When the defendant paid the check upon the forged indorsement, it paid its

Opinion of the Court, per GRAY, J.

own money and discharged no part of its indebtedness to the plaintiff. * * * The plaintiff lost none of its rights by receiving, under a mistake as to the facts, the check as one properly paid and charged to its account by the defendant." But later, in the case of *Viets v. Union Nat. Bank* (101 N. Y. 563), this rule was laid down, that "the refusal to pay on presentation of the check, which presentation is equivalent to a demand of payment, gives to the drawer a right of action, in case he has funds in the bank to meet the check, and the refusal to pay was without his authority."

This doctrine, I find, has the distinct support of a decision of the King's Bench in the case of *Marzetti v. Williams* (1 B. & Adol. 415). That was an action by the drawer of a check against his bankers for failing to pay it to the payees named therein, on presentation. The dishonor was through some inadvertence of the bankers, and, as matter of fact, the check being presented the next day, it was then paid. Lord TENTERDEN held that the action was maintainable, as one founded on the banker's implied contract with his customer, that he will pay checks drawn by him, provided he has moneys of the customer, and a breach of that contract was created when the defendants would not pay the check. Nominal damages were awarded the plaintiff in that case, though he might not have sustained a damage in fact. Justices PARKE, TAUNTON and PATTERSON agreed with Lord TENTERDEN, holding that it was immaterial whether the action was, in form, tort or assumpsit.

The rule is well supported in principle, as well as by the authorities, and governs this case. The damage to the plaintiff here was not merely nominal, for the dishonor of its drafts, but actual, for the amount represented by them, and which the plaintiff had to make good to the payees.

There is but one other question which I think calls for further consideration, and that is as to the exclusion of certain evidence, which the defendant sought to elicit from the witness Wadsworth. By a question to that witness, who was one of the payees of the drafts, defendant endeavored to prove

Opinion of the Court, per GRAY, J.

that when the plaintiff paid back to Wadsworth & Co. the moneys for the drafts which had been dishonored, they had settled with their bookkeeper, and, for his indebtedness to them, including the appropriation by him of these drafts, had received certain property. In support of their right to make this proof they argue that if W. & Co. had made a settlement with their bookkeeper, they were not in any position to demand back the drafts which had been returned to the plaintiff by the defendant as paid, and if plaintiff redelivered the drafts to them under such a state of facts, it acted in its own wrong and the defendant would not be liable. Without discussing the features of such a case, it is sufficient to say that there are two good reasons for the exclusion of the evidence. In the first place no such defense was set up by the answer; nor did that pleading contain any allegation which would raise any other issue than the issue of payment. In the next place, the question, if answered according to its tenor, would not elicit any proof that W. & Co. had been paid. It called for the witness' testimony as to whether his firm did not charge the bookkeeper with the drafts and then take from him various kinds of property "as security for this entire indebtedness, consisting of the checks in part, and did they not receive that property, and did they not collect something from it, etc." But, that they may have received some securities for his indebtedness would not establish the fact of a payment and extinguishment of any claim based on the purchase of the drafts which were dishonored.

I think the action was rightly disposed of below and the judgment appealed from should be affirmed with costs.

All concur.

Judgment affirmed.

Statement of case.

THE WROUGHT IRON BRIDGE COMPANY, OF CANTON, STARK COUNTY, OHIO, Respondent, v. THE TOWN OF ATTICA, Appellant.

119	204
120	332

119	204
166	172
f166	493

119	204
168	85

119	204
d171	1267
d171	268

An act passed in 1887 (Chap. 205, Laws of 1887), which by its title is declared to be "An act to legalize the acts and proceedings" of the town board of auditors, commissioner of highways and of a town meeting in the town of Attica in relation to the erection of a certain bridge, which had been erected under a contract with the highway commissioner, after legalizing said acts and proceedings, contains a provision that it shall not be considered as requiring the town to pay the contract-price, but empowers the contractor to bring suit against the town to recover a fair and reasonable compensation for the work and material. *Held*, the provision is within the scope of the subject expressed in the title, and so is not violative of the provisions of the State Constitution (art. 3, § 16), prohibiting the passage of any private or local act embracing more than one subject and requiring that to be expressed in the title.

Also, *held*, that said act is not repugnant to the provisions of said Constitution (art. 3, § 18), prohibiting the passage of a private or local bill providing for building bridges, or the provision (art. 3, § 18) requiring that in an act authorizing taxation the purpose of the tax shall be stated.

The legislature has power to legalize and validate a claim, supported by a moral obligation and founded in justice, against a town, which has already been declared invalid by the courts, because of failure on the part of the town officers to pursue strictly the prescribed statutory proceedings.

Reported below, 49 Hun, 513.

(Argued January 16, 1890; decided January 28, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of October, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

George Wadsworth for appellant. The act in question is a private and local bill. (*Johnson v. Spicer*, 107 N. Y. 185, 201-204; *People v. O'Brien*, 38 id. 193; *People v. Supervisors*, 43 id. 10; *In re N. Y. E. R. R. Co.*, 70 id. 327;

Statement of case.

People v. McCann, 16 id. 58; *People v. City of Rochester*, 50 id. 553, 558, 559; *People v. Hills*, 35 id. 449, 452, 463; *In re Blodgett*, 89 id. 392, 395, 396; *In re Paul*, 94 id. 506; *In re Van Antwerp*, 56 id. 261; 70 id. 327.) The act does not state the tax and the object to which it is to be applied within the meaning of section 20, article 3, of the Constitution. (*Hurlbert v. Banks*, 1 Abb. [N. C.] 171; *Hanlon v. Supervisors*, 57 Barb. 395.)

Tyrell & Ballard for respondent. Chapter 205 of the Laws of 1887 is constitutional and valid. (Cooley on Const. Lim. 183; *Ogden v. Saunders*, 12 Wheat. 270; *People v. Supervisors of Orange*, 17 N. Y. 241; *Bank v. Van Dyke*, 27 id. 460; *People v. Hayt*, 7 Hun, 39; *People v. Briggs*, 50 N. Y. 558; *Connor v. Mayor, etc.*, 5 id. 293.) The act in question does not deprive the town of Attica and its taxable inhabitants of their property without due process of law. (*In re Van Antwerp*, 56 N. Y. 261; Cooley on Const. Lim. 370; *Tift v. City of Buffalo*, 82 N. Y. 204, 210; *In re Sackett St.* 74 id. 95; *Ensign v. Barse*, 107 id. 329; *Town of Duaneburgh v. Jenkins*, 57 id. 77; *Thomas v. Leland*, 24 Wend. 65; *Town of Guilford v. Supervisors*, 13 N. Y. 143; 18 Barb. 615; *Brewster v. City of Syracuse*, 19 N. Y. 116; *People ex rel. v. Flagg*, 46 id. 401; 47 How. Pr. 511; 16 Hun, 363; 19 N. Y. 118; 41 id. 134; 57 id. 189.) No public moneys or property, within the meaning of section 9 of article 1 of the Constitution, are appropriated by the act in question. (*In re Kingston*, 40 How Pr. 444; *Bd. of Super. v. Allen*, 99 N. Y. 532-539.) The act in question is not in conflict with the letter or spirit of section 16 of article 3 of the State Constitution. (*Neuendorf v. Duryea*, 69 N. Y. 557; Cooley on Const. Lim. 143; *In re Mayer*, 50 N. Y. 504; *U. W. W. Co. v. City of Utica*, 31 Hun, 427; *In re City of New York*, 99 N. Y. 569; *Ins. Co. v. Mayor, etc.*, 8 id. 241; *In re Astor*, 50 id. 363; *Wallack v. City of New York*, 3 Hun, 97-106; *In re Volkening*, 52 N. Y. 650; *Gordon v. Cornes*, 47 id. 608-615; *Brewster v. City of Syracuse*, 19 id. 116;

Statement of case.

In re Van Antwerp, 56 id. 261; *Wenzeler v. People*, 58 id. 516-526; *Matter of Astor*, 50 id. 363; *Wallack v. Mayor, etc.*, 3 Hun, 97; *Rogers v. Stephens*, 86 N. Y. 623; *People v. Whitlock*, 92 id. 191; *In re U. S.* 96 id. 227, 240; *In re Mayor, etc.*, 99 id. 569; *Matter of Knaust*, 101 id. 188-194; *Cole v. State*, 102 id. 49; *Board of Water Commissioners v. Dwight*, 101 id. 9.) The subject of the act is clearly expressed in the title. (*In re Public Parks*, 86 N. Y. 437; *Harris v. Supervisors*, 33 Hun. 279-286; Cooley on Const. Lim. 146; *Astor v. A. R. Co.*, 113 N. Y. 93-110; *McIntyre v. Allen*, 43 Hun, 124; *Matter of Mayor, etc.*, 99 N. Y. 569; *People v. Banks*, 67 N. Y. 568; 1 N. Y. S. R. 600; *Tift v. City of Buffalo*, 82 N. Y. 204-211.) The act does not conflict with sections 17 or 21 of article 3 of the Constitution. (*People v. Hayt*, 7 Hun, 39; *People v. Banks*, 67 N. Y. 568; *In re U. F. Co.*, 32 Hun, 82; 98 N. Y. 140-158.) The act in question does not in any sense of the term "provide for building bridges" as used in section 18, article 3 of the Constitution. It does not direct the building of any bridge, but simply ratifies defective proceedings in reference to a bridge which had already been built. (*Tift v. City of Buffalo*, 82 N. Y. 204-211; *Jones v. Chamberlain*, 16 N. E. Rep. 72-74; *In re McPherson*, 104 N. Y. 306; 93 id. 314; 47 How. Pr. 494-510; *Wallack v. Mayor, etc.*, 3 Hun, 97-108; *People v. Supervisors*, 8 N. Y. 317; *People v. Havemeyer*, 47 How. Pr. 494-512.) No extra compensation is granted by the act. The plaintiff will be content by obtaining the original compensation, say nothing about any extra compensation. (*Town of Guilford v. Board of Supervisors*, 13 N. Y. 143; *People v. Flagg*, 46 id. 401; *Litchfield v. Vernon*, 41 id. 123; *Tift v. City of Buffalo*, 82 id. 204; *Ensign v. Barse*, 107 id. 329; *Wallack v. Mayor, etc.*, 3 Hun, 97; 1 N. Y. S. R. 600; *People v. Supervisors*, 5 N. Y. 517.) Section 23 of article 3 of the Constitution contains nothing prohibitory. (*Supervisors v. Allen*, 99 N. Y. 532-538.) The bridge itself is a sufficient consideration to sustain the tax. (*Thomas v. Leland*, 24 Wend. 65; *Town of Guilford v. Supervisors*, 13 N. Y. 143, 148; *Brewster v.*

Opinion of the Court, per O'BRIEN, J.

City of Syracuse, 19 id. 116-118 ; *People v. Flagg*, 46 id. 401 ; *Tift v. City of Buffalo*, 82 id. 204 ; *Litchfield v. Vernon*, 41 id. 123 ; *People v. Havemeyer*, 47 How. Pr. 494 ; *Townsend v. Mayor, etc.*, 16 Hun, 362.) The act in question is not an *ex post facto* law within the meaning of subdivision 1 of section 10, article 1 of the Constitution of the United States. (Cooley on Const. Lim. 264 ; *Calder v. Bull*, 3 Dallas, 386 ; *Ogden v. Saunders*, 12 Wheat. 266 ; *Burch v. Newberg*, 10 N. Y. 374-391 ; *Southwick v. Southwick*, 49 id. 510-520 ; *Board of Supervisors v. Town of Guilford*, 13 id. 143 ; *Tift v. City of Buffalo*, 82 id. 204 ; *Bay v. Gage*, 36 Barb. 447 ; *Cole v. State of New York*, 102 N. Y. 48.)

O'BRIEN, J. This action was brought by the plaintiff to recover of the defendant the sum of \$4,064.61 and interest, the cost of constructing an iron bridge across Tonawanda creek in one of the public highways of the village and town of Attica.

In July, 1884, a special meeting of the town board, composed of the supervisor, town clerk and justice of the peace of said town, was called and held for the purpose of examining and inspecting the bridge leading over the creek in the highway called Main street in the village of Attica, and determining the question of the sufficiency and safety of the same for public travel. Upon such inspection by such board it was ascertained and determined that the bridge was unsafe, and the same was condemned as such ; and the commissioner of highways of the town was directed to construct or to procure to be constructed a new iron bridge in the place of the one so condemned, at the expense of the town. On the 7th of August, 1884, the commissioner of highways entered into a contract in writing with the plaintiff for the furnishing of the material and the construction of a new bridge at the price of \$3,975. It was also agreed, between the commissioner and the plaintiff, that the plaintiff should remove the old bridge and should be paid for the expense thereof by the town, and the old bridge was accordingly removed by the plaintiff at an expense of \$89.61.

Opinion of the Court, per O'BRIEN, J.

The new bridge was completed in February, 1885, and was accepted by the commissioner of highways, opened to the public and has ever since been used for travel as a part of the public highway in that town. Thereafter, in the same month of February, the commissioner of highways presented to the auditing board of the town his account for the erection and completion of the bridge at the sum of \$3,975, and also the sum of \$89.61, the expense of removing the old bridge, and the auditing board allowed the same, so far as it had power to do so. At the annual town meeting in the same month a resolution was presented to the electors of the town, voted upon and passed, in substance and effect authorizing the supervisor of the town to either raise the amount due the plaintiff for the construction of said bridge and the expense of removing the old one, or to make arrangements to extend the time for the payment thereof; and to that end he was authorized to give the obligations of the town to secure such payment with interest. At the same town meeting a new commissioner was elected to succeed the one who was a party to the contract and proceedings referred to. The plaintiff demanded payment of the amount claimed to be due it under the contract, but payment was refused.

In October, 1885, the plaintiff commenced an action in the Supreme Court against the new commissioner of highways to recover the amount due for the contract-price of the bridge and the expense of removing the old one. Issue was joined and the action was tried in March, 1886. The jury rendered a verdict for the amount of the plaintiff's claim, but, subsequently, upon a motion for a new trial, the judge presiding at the circuit set aside the verdict and held that the contract with the plaintiff for the construction of the new bridge was made without authority; that all the proceedings above stated were unauthorized and ineffectual to bind the town, and that the plaintiff could not recover. It does not appear that this judgment defeating plaintiff's claim was ever disturbed by appeal, or otherwise, but the plaintiff seems to have had recourse to the legislature for relief. For this purpose chapter 205 of the

Opinion of the Court, per O'BRIEN, J.

Laws of 1887 was passed, entitled "An act to legalize the acts and proceedings of the town board, and the town board of auditors of the town of Attica, Wyoming county, in relation to the erection of a certain iron bridge over the Tonawanda creek, on Main street, in the village of Attica, in said town, and the acts and proceedings of the annual town meeting of said town, held on the twenty-second day of February, eighteen hundred and eighty-five, in relation to said bridge, and all the acts and proceedings of George D. Miller, as highway commissioner of said town, in relation to said bridge."

By the first four sections of the act, all the proceedings heretofore stated of the town board of the town, the town auditors of the town, the electors at the town meeting, and the commissioner of highways who made the contract, were legalized and confirmed in all respects, and made binding on the town of Attica. The fifth and last section provided that the act should not be so construed as to require the town to pay the amount audited by the town board or the contract-price of the work, but authorized and empowered the plaintiff to institute and maintain an action at law in any court having competent jurisdiction against the town to recover a fair and reasonable compensation for the work and materials.

After the passage of this act, and in May, 1887, the present action was brought by the plaintiff. Upon the trial, evidence was given by both parties as to the value of the labor performed and materials furnished by the plaintiff in the erection of the bridge. The case was submitted to a jury, and a verdict was rendered in favor of the plaintiff for \$4,414.89. The judgment entered upon this verdict has been affirmed at the General Term, and the defendant appeals to this court.

It is urged in support of the appeal that the act of the legislature, enabling the plaintiff to bring and maintain this action and legalizing the proceedings of the town authorities, is violative of the Constitution. The main contention in support of this proposition is, that the act contains provisions foreign to its general scope and purpose, as expressed in the title. It is urged that the provision contained in the fifth section of the

Opinion of the Court, per O'BRIEN, J.

act, which, in effect, ignores the terms of the contract, and relieves the town from even its moral obligations, so far as the amount of its liability is concerned, and requires the plaintiff to prove the value of the materials and labor used in the construction of the bridge, is a departure from the purpose of the law, as expressed in the title, and, therefore, is violative of section 16, article 3 of the Constitution, which prohibits the legislature from passing any private or local bill, embracing more than one subject, and that shall be expressed in the title.

We think that the provision permitting the plaintiff to sue for the value of the material and labor expended in the construction of the bridge is sufficiently indicated in the title of the act, which is, no doubt, private and local within the meaning of the Constitution. It is only necessary on this point to quote the language of FINCH, J., in *Matter of Mayor, etc., of New York* (99 N. Y. 569): "Where one reading a proposed bill with the title in his mind comes upon provisions, which take him by surprise which he could not reasonably have anticipated, and so both citizen and legislators are misled and thrown off their guard, it is our duty to declare the condemnation of the fundamental law. But, when, as in the present case, no such evil lurks in the title, and the provision criticised may be easily and reasonably grouped within the scope and range of the general subject expressed, we ought not to destroy the legislation upon some nice and rigid criticism of forms of expressions."

It is apparent from the title of the act that its purpose was to legalize the acts and proceedings of the town authorities, under which the plaintiff had constructed the bridge, and to enable the plaintiff to recover a fair and just compensation for its services and for the materials used. With such a title, a provision relieving the town from liability for the amount specified in the contract, if any such liability existed, and allowing it to reduce that amount by proof on the trial, if it could, and permitting the plaintiff to show the value of the labor and materials expended, and limiting its right of recovery to that sum, could deceive no one, take no one by surprise,

Opinion of the Court, per O'BRIEN, J.

whether citizen or legislator, and might well be anticipated from the language of the title. Moreover, this provision was in itself perfectly fair and just to both parties, and quite as favorable to the defendant as to the plaintiff.

It is also urged, in behalf of the appellant, that the legislature had no power to legalize and validate a claim against the town which had already been declared invalid by the judicial tribunals. That this power exists under the Constitution in a proper case was decided in this court in *Town of Guilford v. Supervisors* (13 N. Y. 143). The doctrine of that case has been steadily followed ever since in numerous other cases as late as the case of *Cole v. The State* (102 N. Y. 48). The principle that claims, supported by a moral obligation and founded in justice, where the power exists to create them, but the proper statutory proceedings are not strictly pursued, or for any reason are informal and defective, may be legalized by the legislature and enforced either against the state itself or any of its political divisions through the judicial tribunals, is, we think, now well settled. In our opinion the legislature had the power in this case to legalize the defective proceedings of the town authorities upon the faith of which the plaintiff acted, and in this way confer power upon the courts to compel the town to pay those obligations which its officers contracted without observing the necessary steps pointed out by the statute, and the benefits of which it had already received and continues to enjoy.

The legislation in question has also been attacked by the defendant as in violation of other provisions of the Constitution. Its condemnation is demanded under section 18 of article 3, which prohibits the passage of any private or local bill providing for building bridges; under section 20 of article 3, which requires that in bills authorizing taxation the purpose of the tax shall be stated, and also under various other provisions of the Constitution.

We do not consider it necessary to notice with more particularity these several objections, as it would unnecessarily extend this discussion and would not answer any useful purpose. We

Statement of case.

have already considered all the points passed upon by the court below. It is enough to say that we have carefully examined all the objections to this bill urged by the learned counsel for the appellant, and we think that no provision of the Constitution is violated in the general scope and purpose of the act itself, the substance of any of its provisions or in the manner of its enactment by the legislature.

The other questions raised by the exceptions taken by the defendant in the course of the trial were correctly disposed of in the courts below.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed. _____

119	212
124	588
125	198
119	212
134	839
119	212
136	407
119	212
137	176
119	212
155	108

BYRON J. STROUGH, as Supervisor, etc., Appellant and Respondent, v. THE BOARD OF SUPERVISORS OF JEFFERSON COUNTY, Appellant and Respondent.

Where a county treasurer, instead of applying taxes assessed on the property of a railroad corporation in a town to the payment or redemption of bonds of the town, issued in aid of the construction of the road of such corporation, as required by the act of 1869 (Chap. 907, Laws of 1869), as amended in 1871 (Chap. 283, Laws, of 1871), applied them in payment of county and state taxes, with and as part of, other moneys raised by the town for those purposes, *held*, that an action, as for money had and received, was maintainable on behalf of the town against the county to recover the money so misappropriated; that the liability included as well the portion of the funds applied in payment of the state tax as that applied for other county purposes; also, that the action was properly brought by the supervisor of the town in his name as its representative.

The cause of action in such case arises when the misappropriation is made; the statute of limitations then begins to run against it, and an action brought more than six years thereafter is barred.

While every duty imposed upon a public officer is in the nature of a trust, persons injured by a violation of the duty for which they may maintain an action at law, must pursue that remedy within the period of limitation of legal actions.

Also, *held*, the fact that the supervisors of the town for the period of fourteen years were apprised from year to year, while sitting as members of the board of supervisors of the county, of the misappropriation and made no objection thereto, did not estop the town from claiming a repayment of the money.

Statement of case.

A town cannot be estopped by the neglect of its supervisor to assert a claim against the county, the grounds of which are equally known to all members of the board of supervisors.

A county treasurer in the payment of state taxes to the state comptroller acts as agent for the county, and pays on its behalf

Bridges v. Board of Supervisors (92 N. Y. 570) distinguished, so far as it relates to the liability of the county for the portion of the fund applied in payment of state taxes.

Reported below, 50 Hun, 54.

(Argued January 16, 1890; decided January 28, 1890.)

CROSS APPEALS from judgment of the General Term of the Supreme Court in the fourth judicial department, in favor of plaintiff, entered upon an order made November 13, 1888, which directed a judgment upon a case submitted under the Code of Civil Procedure.

The facts set forth in the case, so far as material, are stated in the opinion.

Wayland F. Ford for plaintiff. The provisions of chapter 907 of the Laws of 1869, as amended by chapter 283 of the Laws of 1871, are valid. (*Bridges v. Board of Super.*, 92 N. Y. 570.) By the statute a trust is created for the benefit of the town, a continuous one, and in such case the statute of limitations does not begin to run until there is a denial of the right of the beneficiary. (*Kane v. Bloodgood*, 7 Johns. Ch. 90; *Pomeroy's Eq. Juris.* § 1048; *Swinburne v. Swinburne*, 28 N. Y. 568; *James v. Cowing*, 17 Hun, 269; *Oliver v. Platt*, 3 How. [U. S.] 332; *Saunders v. Dehew*, 2 Vt. 271; *Pye v. George*, 2 Salk. 686; 6 H. L. Cas. 214, 216; 3 Johns. Ch. 190; *Coster v. Murray*, 5 id. 522; *Murray v. Coster*, 20 Johns. 575; *Payne v. Gardiner*, 29 N. Y. 146; *Price v. Danforth*, 107 id. 309; Code, § 410; *Purdy v. Sistare*, 4 T. & C. 408; *Reitz v. Reitz*, 80 N. Y. 538; *Higgins v. Higgins*, 14 Abb. [N. C.] 13; *Corkins v. State of New York*, 99 N. Y. 491; *Roberts v. Brownell*, 61 Barb. 31; Wood on Lim. § 212; *Rockham v. Siddall*, 1 Mac. & Gor. 605.) The defendant is liable for interest. (Pom. Eq. Juris. §§ 1079, 1080; *Dunscumb v. Dunscumb*, 1 Johns. Ch. 508; *Bridges v. Board of Super.*, 92 N. Y. 587.)

Opinion of the Court, per ANDREWS, J.

Watson W. Rogers for defendant. The plaintiff is estopped by its own acts from recovering. (*Stoddard v. Whiting*, 46 N. Y. 627; 3 R. S. [8th ed.] 1048, § 18; *Peck v. Burr*, 10 N. Y. 294; *County of Randolph v. Port*, 93 U. S. 502, 513; 5 Abb. [N. C.] 49.) The plaintiff, as supervisor, cannot maintain this action. (Laws of 1886, chap. 398; *People ex rel. v. Brown*, 55 N. Y. 180, 185, 186; *Gailor v. Herrick*, 42 Barb. 79; *Town of Gallatin v. Lovek*, 21 id. 578.) If it shall be claimed the county treasurer or the board of supervisors knew the town of Orleans had issued bonds, then it is submitted the moneys in question were misapplied through a misunderstanding of the law, and that for a mistake of law there is no remedy, at law or in equity. (*Jacobs v. Marange*, 47 N. Y. 57; *Doll v. Earle*, 59 id. 638; *Weed v. Weed*, 94 id. 247; *N. L. Ins. Co. v. Mirch*, 53 id. 151; *Nat. Bk. v. Bd. of Super.* 106 id. 488; *Wood v. Supervisors*, 50 Hun, 1.) The court below was right in holding that the claim for all the moneys paid prior to June 1, 1883, was barred by the six-years statute of limitation. (Code Civ. Pro. § 380; *Stacy v. Graham*, 14 N. Y. 492; *Howard v. France*, 43 id. 593; *Roberts v. Ely*, 113 id. 128; *Mills v. Mills*, 115 id. 80; *Allen v. Miller*, 17 Wend. 202; *Foot v. Farryton*, 41 N. Y. 164; *Morris v. Budlong*, 78 id. 544-558; *Argall v. Bryant*, 1 Sandf. 98; *Miller v. Ward*, 41 Hun, 600; *Carr v. Thompson* 87 N. Y. 160; *Price v. Munfred*, 107 id. 303-309; *Lawrence v. Stoddard*, 103 id. 672; *Perry on Trusts*, § 865.)

ANDREWS, J. The county treasurer of Jefferson county, from 1873 to 1887, omitted to perform the duty imposed upon him by the fourth section of chapter 907 of the Laws of 1869, as amended by chapter 283 of the Laws of 1871, to apply the taxes assessed during those years on the property of the Clayton and Theresa Railroad, within the town of Orleans in said county, and collected and paid over to him, either to the purchase of the bonds of said town, issued in aid of the construction of said railroad, or in the purchase of other bonds to be held as a sinking fund for their redemption. The aggregate taxes so col-

Opinion of the Court, per ANDREWS, J.

lected from the railroad for state and county purposes, was \$4,845.31, and were paid out by the treasurer for general county purposes, including state taxes. It is one of the agreed facts, that at the times the moneys were so applied, neither the county treasurer nor any officer of the county was cognizant of the duty imposed by the act of 1871, and that there was no intentional misapplication of the taxes in question. The warrants issued by the board of supervisors, under which they were collected, were in the usual form, and required the collector to pay over certain specified sums to various town officers, and a certain sum to the county treasurer on account of the state tax levied on the town of Orleans, and, to pay to the treasurer the remainder of the moneys collected, not otherwise particularly appropriated. There was no specific direction in the warrants in respect to the disposition to be made of the taxes collected from the railroad, and they were included in the aggregate sum paid to the treasurer and there was no separate application of those moneys by him, to state or county purposes, but the same were applied with, and as a part of, the other moneys raised in the town.

In the year 1872 bonds of the town of Orleans, to the amount of \$80,000, were issued in aid of the construction of the Clayton and Theresa Railroad. Litigation arose as to the validity of the proceedings to bond the town, and no taxes were raised in the town to pay the interest or principal of the bonds until the year 1879, which was after the decision of the United States Supreme Court affirming the validity of the bonds, in the case of *Orleans v. Platt* (99 U. S. 676), made in 1878. The attention of the board of supervisors and of the county treasurer was first called to the provisions of section 4, of the act of 1871, in the fall of 1887, when a demand was made upon the board, in behalf of the town, for repayment into the treasury of the county, of the taxes collected in said town from the railroad, and used in payment of state and county taxes. Thereafter, the plaintiff, as supervisor of the town of Orleans, and the defendant, the board of supervisors of Jeffer-

Opinion of the Court, per ANDREWS, J.

son county, made an agreed case for the submission of the controversy between the town and the county to the determination of the court, under section 1279 of the Code. The General Term sustained the claim of the town to have the moneys collected from the railroad, and used for the payment of state and county taxes, refunded by the defendant, but the court limited the recovery to moneys so misapplied within the period of six years prior to May 1, 1888, the date of the submission, and awarded judgment against the defendant for the amount of the taxes diverted during these years, with interest, and directed that the sum recovered should be paid to the county treasurer, to be applied as required by the act of 1871. Both parties have appealed, the plaintiff from the part of the judgment limiting the recovery to six years, and the defendant from the whole judgment.

The constitutionality of the act of 1871 was considered by the court *In re Clark v. Sheldon* (106 N. Y. 104). That was a proceeding by petition under the act of 1869, against a county treasurer to compel him to appropriate taxes collected in the town of Sodus, Wayne county, from railroads in that town, as required by the act, and it was decided that the relief should have been granted.

It is insisted, however, that the plaintiff, as supervisor, cannot maintain the action. There can now be no controversy that the legal rights of the town of Orleans were disregarded in the application of the sums collected in that town from the Clayton and Theresa Railroad. This was an injury to a property right of the town, and may, we think, be redressed, if actionable at all, at the suit of the supervisor of the town, as the representative of its interests. The bonds issued were the obligations of the town. They are a charge upon the taxable property within the town, and there is no other resource for their payment. The act of 1869, as amended in 1871, relieved towns which should issue bonds in aid of the construction of railroads therein to some extent from the burden of the obligation, by appropriating the taxes on the railroad property therein as a special fund for the payment *pro tanto* of the

bonds issued. It is true that the taxes are collected from individual and private property, and not out of the corporate property of the town, but the statute, in substance, gives the town in its corporate capacity the beneficial ownership of the fund when it directs its application to discharge a corporate obligation. The case of *Bridges v. Board of Supervisors of Sullivan County* (92 N. Y. 570) sustained an action brought by the plaintiff as supervisor of one of the towns of that county, to recover from the county money raised in the town by taxation on the property of the New York and Oswego Midland Railroad, and applied by the board of supervisors to county purposes, contrary to the provisions of chapter 296 of the Laws of 1874. By that act "all moneys to be collected (by taxation) upon the real or upon the real or personal property of the said corporation in any towns or municipalities, by which bonds have been issued in aid of the construction of (said railroad), are hereby appropriated to said towns or municipalities respectively." The act required the collector to pay over the railroad tax, when collected, to the railroad commissioners, who were directed to apply the same to the payment of the interest and principal of the bonds. This is a decisive authority in favor of the right of the present plaintiff to maintain this action, as one brought to vindicate and enforce a property right of the town he represents. Other authorities support the same conclusion. (*Hathaway v. Town of Cincinnati*, 62 N. Y. 434, and cases cited.)

The further contention is made that, assuming the misapplication of the money by the defendant, the town of Orleans has lost its remedy by acquiescence and laches. It appears that for a period of fourteen years the town of Orleans was represented by its supervisor in the board of supervisors, who was apprised from year to year of the disposition made by the county treasurer of the railroad taxes in the town, that is, that they formed a part of the aggregate fund out of which the state and county charges were paid, and that the supervisor of Orleans made no objection until the year 1887. It is insisted that the town of Orleans having, during this period, had the

benefit of the taxes collected from the railroad, by their application to county purposes, thus diminishing its taxation *pro tanto* for those purposes, is estopped from now insisting that the county should repay the money, although the application was unauthorized. The answer is obvious. If the county is compelled to restore the money wrongfully diverted, it will simply reinstate the county and the several towns to their prior position. The county has had the benefit of the money belonging to the town of Orleans. If restoration is made, each town, including the town of Orleans, will contribute by taxation its ratable proportion of the fund required for the repayment. In other words, each town will pay back its proportion of the taxes illegally diverted, and the tax to create the fund for reimbursement will be equivalent to what should have been originally imposed to meet its obligations, but which were discharged in part by the misapplication of the money of the town of Orleans. The town of Orleans, moreover, cannot be estopped by the neglect of its supervisor to assert a claim, the grounds of which were equally known to all the members of the board.

The point that the proportion of the railroad taxes paid by the county treasurer to the comptroller for the state tax should not be charged against the county, assumes that the county treasurer, in the payment of state taxes, does not act as the agent of the county. The quota of state taxes of each county is a county charge in the sense that the scheme of taxation makes each county a debtor therefor. When the county treasurer paid the state tax, he paid in its behalf an obligation of the county. The county had the benefit of the misapplication of the money of the town of Orleans, so far as it went to pay the state tax. We perceive no ground upon which a liability for this part of the fund can be distinguished from the liability for the part applied to other county purposes. If the county is liable for one part, it is, we think, for the other also. (See *Mayor, etc., v. Davenport*, 92 N. Y. 604.) To avoid misapprehension it should be observed that the act under consideration in *Bridges v. Board of Supervisors, etc.* (*supra*),

Opinion of the Court, per ANDREWS, J.

only appropriated to the use of towns or municipalities respectively, whose bonds were issued for the construction of the New York and Oswego Midland Railroad, the part of the taxes raised therein known, technically, as the county taxes, while the act now in question appropriates all taxes on railroads, except those raised for school and road taxes, to the use of the town issuing bonds under the act of 1869, including therefore as well what is known as the state tax, as the county tax proper.

The misappropriation of the taxes in question being conceded, there can, we think, be no doubt that an action lies against the county in behalf of the town of Orleans, to recover back the money misappropriated, on the principle upon which the equitable action for money had and received is founded. The money was collected in the town under the warrant of the board of supervisors. It was paid by the collector into the treasury of the county. In contemplation of law it was received by him for the purposes specified in the act of 1871, viz., the purchase or final redemption of the outstanding bonds of the town of Orleans. The county applied it, in contravention of the act, towards the discharge of county obligations. It ought in justice to restore it and make good to the town what it has lost by its unauthorized acts. To compel the performance of this duty, an action for money had and received is an appropriate remedy. It was held in *Newman v. Supervisors of Livingston County* (45 N. Y. 676) that this form of action could be maintained against a county to recover back money collected on an illegal tax and paid into its treasury, and the fact that in this case the tax was legal, and that the wrong consisted in the improper diversion by the county of a fund belonging to the town, can make no difference. In *Bridges v. Supervisors of Sullivan County* (*supra*), an action for money had and received was held to be the proper remedy, under a state of facts quite similar to those in the case before us. The promise upon which the action for money had and received is founded, is implied by law from the duty resting upon one who wrong-

Opinion of the Court, per ANDREWS, J.

fully withholds from another money which he cannot conscientiously retain, to account for and restore it to the person or party equitably entitled to it.

The final question arises upon the appeal of the town from the part of the judgment limiting the recovery to the taxes collected and appropriated within six years prior to the submission. Section 382, of the Code of Civil Procedure, prescribes a limitation of six years after the cause of action has accrued to certain actions, and among others, to "an action upon a contract obligation, or liability, express or implied, except a judgment or sealed instrument." It is stated in the submission in this case, that the several sums collected and paid to the treasurer of Jefferson county on account of railroad taxes in the town of Orleans, were "paid out and expended in payment of the debts and liabilities of the county of Jefferson, on the first day of June of each year, after the year for which the tax was collected." A cause of action, therefore, for money had and received, arose on the first day of June of each year from 1873, against the county in favor of the town, for the sum so misappropriated on that day, and this cause of action would be barred in six years from that date. The plaintiff insists that the action is for a breach of trust and the misuse of trust funds, and that the statute does not commence to run against such a cause of action until there is a denial of the right of the beneficiary. The duty imposed on the treasurer was in a general sense a trust duty. This is true of every duty imposed on a public officer, but persons injured by a violation of the duty, for which they may maintain an action at law, must pursue their remedy within the period of limitation of legal actions. (See *Roberts v. Ely*, 113 N. Y. 128; *Butler v. Johnson*, 111 id. 204; *Matter of Neilley*, 95 id. 386.) The legal remedy here was adequate, and the cause of action was definite and distinct as to each misappropriation at its date, and we see no escape from the conclusion that the limitation is governed by section 382, and consequently that no recovery can be had back of six years. The limitation of ten years prescribed in

Statement of case.

section 388 has no application, because another limitation is prescribed by section 382.

There seems to have been an error in computation in the judgment below. The plaintiff is entitled to judgment for all taxes misappropriated by the county within six years prior to May 1, 1888. It should include the taxes levied in 1881, but which were not applied to county purposes until June 1, 1882, and also all subsequent taxes received by the treasurer on or prior to June 1, 1887.

The judgment should be amended in this particular, and as so amended, should be affirmed.

All concur.

Judgment accordingly.

119	221
122	374
119	221
142	445
119	221
166	198

MARY T. LARKIN, Respondent, v. HUGH O'NEILL, Appellant.

In an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appeared that plaintiff, a woman thirty-five years old, had been in the habit, for ten years, of making purchases frequently at defendant's drygoods store; that she fell while descending a broad, carpeted staircase in said store, which staircase was safely, properly and conveniently constructed in all respects. The only proof upon which the claim of negligence was founded was the presence of a figure for exhibiting children's clothing upon the steps next the railing, and the absence from the steps of footholds, *i. e.*, brass plates or rubber pads. At the close of the evidence a motion was made for a nonsuit, which was denied. *Held*, error; that there was no evidence of negligence on the part of defendant which could properly have been submitted to the jury; that while the business of the defendant was, from its very nature, an invitation to the public to enter upon his premises, and he was bound to use reasonable prudence and care in keeping his store in such a condition that those so entering were not unnecessarily or unreasonably exposed to danger, his duty was measured by and limited to such reasonable prudence and care.

Larkin v. O'Neill (48 Hun, 591), reversed.

(Argued January 28, 1890; decided January 31, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 21, 1888, which affirmed a judgment in

Statement of case.

favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for personal injuries alleged to have been caused by defendant's negligence.

The material facts are stated in the opinion.

Edward C. James for appellant. The motion to dismiss the complaint, because there was no evidence of negligence on the part of the defendant, should have been granted. (*Larmore v. Iron Co.*, 101 N. Y. 395; *Beck v. Carter*, 68 id. 283; *Bennett v. R. R. Co.*, 102 U. S. 577; *Crafter v. M. R. Co.*, L. R. [1 C. P.] 300; *Dougan v. C. T. Co.*, 56 N. Y. 1; *Crocheron v. F. Co.*, Id. 656; *Cleveland v. N. J. S. Co.*, 68 id. 306; *Loftus v. U. F. Co.*, 84 id. 455; *Marsh v. Chickering*, 101 id. 396; *Lafflin v. R. R. Co.*, 106 id. 136; *Kelly v. R. R. Co.*, 109 id. 44.) The cause of the plaintiff's fall must not be left to conjecture; she must show by competent proof that it was occasioned by the defendant's negligence, without fault on her own part. If she fails to do this her complaint must be dismissed. (*Cordell v. Railroad Co.*, 75 N. Y. 332; *Beaulec v. Railroad Co.*, 59 id. 356; *Taylor v. Yonkers*, 105 id. 202, 209; *Searles v. Railway Co.*, 101 id. 661; *Ring v. Cohoes*, 77 id. 83, 88.) It was error to allow proof that other persons had fallen upon these stairs, without evidence showing that it was from the same cause and under similiar conditions as the fall of plaintiff. It was also error to allow proof of falls, without reference to whether they occurred before or after plaintiff's fall, and without any explanation as to how they occurred; and without proof that they were known to the defendant. (*Johnson v. M. R. Co.*, 52 Hun, 111; *Fillo v. Jones*, 2 Abb. Ct. App. Dec. 121; *Wooley v. R. R. Co.*, 83 N. Y. 121, 130; *Quinlan v. Utica*, 11 Hun, 217; 74 N. Y. 603; *Burns v. Schenectady*, 24 Hun, 10; *Eggleston v. C. T. Road*, 18 id. 146; *Avery v. Syracuse*, 29 id. 537-540; *Dist. of Columbia v. Armes*, 107 U. S. 519, 524-5; *Sherman v. Kortright*, 52 Barb. 267; *Erwin v. Steamboat Co.*, 6 Wkly. Dig. 452; *Mailler v. E. P. Line*, 61

Statement of case.

N. Y. 312.) The husband's right of action for a personal injury to his wife is not assignable, and the assignee cannot recover for future services. (*People v. T. C. Com. Pleas*, 19 Wend. 73; *Hegerich v. Keddie*, 99 N. Y. 258, 266; *Black v. Griswold*, 104 id. 613; Code Civ. Proc. § 3343, subd. 9; *Maxson v. D., L. & W. R. R. Co.*, 112 N. Y. 559; *Filer v. R. R. Co.*, 49 id. 47, 56; *Brooks v. Schurerin*, 54 id. 343; *Reynolds v. Robinson*, 64 id. 589; *Birkbeck v. Ackroyd*, 74 id. 356; *Coleman v. Burr*, 93 id. 17.)

Ira Leo Bamberger for respondent. The defendant was guilty of negligence. Where the relation of trafficker and customer exists, the party who derives benefit from the coming upon his premises is bound to exercise something more than ordinary care. (Smith on Neg. 131; *Frieze v. Cameron*, 4 Rich. 228; *Chapman v. Rothwell*, 1 El. B. & E. 168; *Bennett v. L. & N. R. R. Co.*, 102 U. S. 577; *Ackart v. Lansing*, 48 How. Pr. 380.) It was eminently proper to prove that other customers of the defendant had frequently fallen down the stairs previous to the plaintiff's accident, and that a similar accident had happened the day previous to the occurrence in question. (*Quinlan v. City of Utica*, 11 Hun, 219; 74 N. Y. 603; *Magee v. City of Troy*, 48 Hun, 396; *Avery v. City of Syracuse*, 39 id. 537; *District of Columbia v. Armes*, 107 U. S. 519; *Burns v. City of Schenectady*, 24 Hun, 10; *Guil-laden v. C. W. Co.*, 18 Wkly. Dig. 303; *L. R. R. Co. v. Wright*, 16 N. E. Rep. 145; *City of Delphi v. Lowrey*, 74 Ind. 520, 523; *R. R. Co. v. Newell*, 104 id. 264; *City of Fort Wayne v. Combs*, 107 id. 75; *Cook v. New Durham*, 13 At. Rep. 650; *Darling v. Westmoreland*, 52 N. H. 401; *Pomfrey v. Village of Saratoga*, 104 N. Y. 469; *City of Topeka v. Sherwood*, 18 Pac. Rep. 933; *Western v. City of Troy*, 3 N. Y. Supp. 450; *Ster v. Tuety*, 45 Hun, 49; *Johnson v. Manhattan R. Co.*, 4 N. Y. Supp. 848.) The husband was, in the nature of things, the very best expert as to the value of the wife's services. They were personal to him, and he was necessarily the most competent person to testify as

Opinion of the Court, per O'BRIEN, J.

to their value. (*Matteson v. N. Y. C. R. R. Co.*, 35 N. Y. 493.) Evidence of the plaintiff's husband as to the condition of the stairs on the day after the accident, was merely corroborative of the testimony of the plaintiff and properly admissible under the decisions. (*Morrell v. Peck*, 88 N. Y. 402; *Brennan v. Lachat*, 5 N. Y. S. R. 884.)

O'BRIEN, J. The plaintiff recovered a verdict as damages for personal injuries sustained by falling down stairs in the defendant's store on Sixth avenue, between Twentieth and Twenty-first streets, in the city of New York, on the 27th day of February, 1885. It is claimed that this accident was the result of the defendant's negligence.

The plaintiff is a married woman about thirty-five years of age. She had been, for ten years prior to the accident, a customer of the defendant's store, and during that time, in every year, had frequently been at the store to purchase goods for herself and her family.

On the day of the accident she went to the store to buy goods, and entered on the Twentieth street side. After making some purchases on the ground floor, she went up to the cloak-room on the second floor in the elevator, and after purchasing a cloak there she inquired for the underwear department, and was told that it was down stairs. One of the clerks pointed out to her the stairs leading down to this part of the store. While attempting to walk down the stairs she fell and sustained the injuries for which the damages were awarded.

It appeared, by the undisputed evidence, that the stairway had been built a few years before by a competent builder of twenty-eight years experience. It was composed of eleven steps, each fifteen feet long, with a rise of seven and a half inches, and a tread of ten and a half inches. The stairs were carpeted down the center for a width of about nine feet, leaving about a yard uncovered at either side. On the left, going down, was a railing protecting the well-hole, and on the right a plain wall. On the uncarpeted part of the step next to the railing, and a few inches inside it, there was placed on the

Opinion of the Court, per O'BRIEN, J.

steps a small form or figure for exhibiting suits for children two or three years of age. A great number of people passed up and down these stairs every day. The defendant proved by an architect and stair builder that the stairs were safely, properly and conveniently constructed in all respects. Indeed, the only proof of negligence on the part of the defendant that seems to be relied upon by the plaintiff to uphold the verdict is the presence of the figure for exhibiting children's clothing next the railing, and the absence from the steps of footholds, brass plates or rubber pads. The defendant was a dry goods dealer, transacting a very extensive business. A large number of people frequented his store every day. The business that he was conducting was, from its very nature, an invitation to the public to enter upon his premises. He was bound to use reasonable prudence and care in keeping his place in such a condition that people who went there by his invitation were not unnecessarily or unreasonably exposed to danger. The measure of his duty was reasonable prudence and care. (*Beck v. Carter* 68 N. Y. 383; *Larmore v. Crown Point Iron Co.*, 101 id. 391, 395; *Bennett v. R. R. Co.*, 102 U. S. 577.)

There is no proof in the case from which it could be found that the defendant neglected any duty that he owed to the plaintiff. She was not exposed to any unreasonable or concealed danger. She fell while walking down a broad, carpeted stairway, between four and five o'clock in the afternoon. There was nothing in the manner in which the stairs were constructed, used or kept from which such a result could reasonably be anticipated. It is quite probable that the accident occurred from slipping, or from a misstep by the plaintiff. But whatever caused the injury it is quite clear that it could not be attributed to any want of care on the part of the defendant. The language of the court in *Crafter v. Metropolitan Railway Co.* (L. R. [1 C. P.] 300) applies: "The line must be drawn in these cases between suggestions and possible precautions, and evidence of actual negligence, such as ought reasonably and properly to be left to a jury. It is difficult, in some cases, to determine where the line is to be drawn, but

Statement of case.

here I have no hesitation in saying that there was no evidence of negligence which could properly be left to the jury. There was nothing unusual in the construction of the staircase. The use of brass for protecting the edges of the stairs, and absence of a hand-rail, which alone are relied on by the plaintiff, are by no means unusual in staircases of a similar description, where the traffic is great. They were obvious to everyone using the stairs, and were well known to the plaintiff himself. The plaintiff has no right to complain of the absence of accommodation of an unusual kind."

We think there was no evidence in this case of negligence on the part of the defendant that could properly have been submitted to the jury, and it follows that the defendant's request for a nonsuit at the close of the case should have been granted.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

119	226
140	10
119	226
150	479
j 150	521
119	226
158	195
119	226
157	8

GEORGE W. LAWTON et al., Appellants, v. WILLIAM N. STEELE,
Respondent.

The state legislature has power to declare places or property used to the detriment of public interests or the injury of the health, morals or welfare of the community, public nuisances, although not such at common law.

It seems, however, this power may not be used as a cover for withdrawing property from the protection of the law, or, arbitrarily, where no public right or interest is involved in declaring property a nuisance for the purpose of devoting it to destruction, and if the court can judicially see that the statute is a mere evasion or was framed for the purpose of individual oppression, it may be set aside as unconstitutional.

The legislature has power to regulate and control the right of fishing in the public waters of the state, and in the exercise of this power may prohibit the taking of fish with nets in specified waters, and by its declaration, make the setting of nets for that purpose a public nuisance. Where a public nuisance consists in the location or use of tangible personal property, so as to interfere with or obstruct a public right or regulation,

Statement of case.

the legislature may authorize its summary abatement by executive agencies without resorting to judicial proceedings; and any injury to or destruction of the property necessarily incident to the exercise of the summary jurisdiction, interferes with no legal right of the owner, and is not violative of the constitutional prohibition against depriving the owner of his property without due process of law.

The legislature, however, may not decree the destruction or forfeiture of property used so as to constitute a nuisance, and appoint officers to execute its mandate as a punishment of the wrong or even to prevent a future illegal use of the property, it not being a nuisance *per se*.

It seems a public nuisance may only be abated by an individual where it obstructs his private rights, or interferes at the time with his enjoyment of a right common to many, and he thereby sustains a special injury.

Where provisions of a statute are separate and one is unconstitutional, while the others are valid, the latter will be sustained and the former only rejected.

Accordingly, *held*, that the provision of the act of 1883 (§ 2, Laws of 1883, chap. 317), declaring "any net found * * * * in or upon any of the waters of this state, or upon the shores or islands in any waters in this state, in violation of any existing or hereafter enacted statutes or laws for the protection of fish," to be a nuisance, authorizing its summary abatement and destruction by any person, and making it the duty of every fish protector and constable "to seize and remove and forthwith destroy the same," so far as it authorizes the destruction, by a fish protector or constable, of nets found in actual use in the waters of the state, was constitutional; and that its constitutionality was not affected by the authorization also given to private individuals and officers to destroy nets on land.

Black River bay is part of Lake Ontario, within the meaning of the act of 1886 (Chap. 141, Laws of 1886), prohibiting the killing or taking of fish by nets in certain portions of said lake.

(Argued December 19, 1889; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 12, 1889, which reversed a judgment in favor of plaintiffs entered upon a verdict, and ordered a new trial.

This action was brought to recover the value of sixteen hoop or fike nets belonging to plaintiffs, which were destroyed by defendant; twelve of the nets were found by defendant set in the waters of Black River bay, an inlet of Lake Ontario, for the purpose of catching fish, the four others were on shore. Defendant was a state fish and game protector and justified

Statement of case.

as such ; the provision of the statute under which he justified is set forth in the opinion.

E. C. Emerson for appellant. The appeal properly lies from the decision of the General Term reversing the plaintiff's judgment and ordering a new trial. (Code, § 191, subd. 3 ; *Zoeller v. Riley*, 1 How. Pr. [N. S.] 525 ; 98 N. Y. 669 ; *Byrnes v. City of Cohoes*, 67 id. 294 ; Code, §§ 1318, 1346, 1347 ; *Wright v. Hunter*, 46 N. Y. 410, 412 ; *Pharis v. Gere*, 107 id. 231, 235 ; *Dickson v. B. & S. A. R. R. Co.*, 47 id. 507, 509 ; *Harris v. Burdett*, 73 id. 136, 139 ; *Suebley v. Conner*, 78 id. 218 ; *Mack v. R. G. Ins. Co.*, 106 id. 560 ; *Case v. Dexter*, Id. 548-555 ; *Kiley v. W. U. T. Co.*, 109 id. 231, 238.) Chapter 591, Laws of 1880, as amended by chapter 317, Laws of 1883, so far as it provides for the summary seizure and destruction of fishing nets, is unconstitutional. (Laws of 1880, § 1, chap. 591 ; Laws of 1883, chap. 317 ; U. S. Const. 5th and 14th Amend. § 1 ; N. Y. Const. art. 1, § 6 ; *Stewart v. Palmer*, 74 N. Y. 184, 191 ; *In re McPherson*, 104 id. 306, 321 ; *People v. Supervisors*, 70 id. 229 ; *Taylor v. Porter*, 4 Hill, 140 ; *Rockwell v. Nearing*, 35 N. Y. 302 ; *Campbell v. Evans*, 45 id. 358 ; *In re Cheesebrough*, 78 id. 233, 237, 238 ; *In re Jacobs*, 98 id. 98, 108 ; *People v. Gillson*, 109 id. 389, 400 ; 3 Blackst. Comm. 216 ; *Coe v. Schultz*, 47 Barb. 64, 67 ; Wood on Nuisance, § 1 ; *Wynehamer v. People*, 13 N. Y. 378, 393, 416, 454 ; *Willis v. Warren*, 1 Hill, 590, 594 ; *Village of Des Plaines v. Poyer*, 14 N. E. Rep. 677 ; *Brown v. Perkins*, 12 Gray, 89 ; *Salter v. Van Derveer*, 47 Hun, 366 ; 3 Blackst. Comm. 5216 ; 2 Br. & Had. Comm. [Wait's ed.] 219 ; 4 Wait's A. & D. 726 ; Penal Code, § 385 ; *Russell v. Mayor, etc.*, 2 Den. 461, 473, 474 ; *Welch v. Stonwell*, 2 Doug. [Mich.] 332, 341 ; Wood on Nuisances [2d. ed.], §§ 33, 738 ; *Harrower v. Ritson*, 37 Barb. 301, 304, 310 ; *Rex v. Pappineau*, 2 Strainge, 688 ; 2 Salk. 458 ; *C. B. Co. v. Paige*, 83 N. Y. 178, 188, 189 ; 1 Hilliard on Torts [3d ed.] 577, § 18a ; *Barclay v. Comrs.*, 25 Penn. St. 503, 505 ; *Ely v. Super.*, 36 N. Y. 297 ; *Fisher v. McGirr*, 1 Gray, 1 ; *Larson*

Statement of case.

v. *Furlong*, 50 Wis. 681; *Miller v. Snover*, 42 N. J. L. 341.) Aside from the statute under consideration, the defendant had no right to remove and destroy the nets as being a purpresture or nuisance. (*Brookhaven v. Strong*, 60 N. Y. 56; Wood on Nuisances [2d. ed.], §§ 77, 84, 480, 732, 733, 740; *Griffiths v. McCullum*, 46 Barb. 561; *F. P. B. Co. v. Smith*, 30 N. Y. 44; *Harrower v. Ritson*, 37 Barb. 301; *Rogers v. Rogers*, 14 Wend. 131; *Lansing v. Smith*, 8 Cow. 146, 151; *Goldsmith v. Jones*, 43 How. Pr. 415; *Grant v. Mouk*, 26 Hun, 380; *Mayor, etc., v. Brooks*, L. R. [7 Q. B.] 339; *Dinus v. Petley*, L. R. [15 id.] 276; *Brown v. Perkins*, 12 Gray, 89; *Cobb v. Bennett*, 75 Penn. St. 326; *Francis v. Schwellkopf*, 53 N. Y. 152, 155; *Doolittle v. Suprs.*, 18 id. 160; *Moody v. Suprs.*, 46 Barb. 660, 666; *Taggart v. Comrs.*, 21 Penn. St. 527; *Greensdale v. Holliday*, 6 Bing. 379.) Upon the facts of this case the plaintiffs were entitled to recover the value of the property destroyed. (1 Hilliard on Torts [3d. ed.], 154, 155, 159, 164, 165 [chap. 4, §§ 20, 21, 26]; *Welch v. Wesson*, 6 Gray, 505; *Nodine v. Doherty*, 46 Barb. 59, 60; *Berthoff v. O'Reilly*, 8 Hun, 16, 18; *Ely v. Suprs.*, 36 N. Y. 297, 300; *Larson v. Furlong*, 50 Wis. 690; *Harrower v. Ritson*, 37 Barb. 301, 310; 85 N. Y. 278; 4 Den. 95.) Chapter 141, Laws of 1886, so far as it prohibits fishing in the waters of Lake Ontario, is unconstitutional. (Laws of 1879, chap. 534, § 26; Laws of 1880, chap. 531; *People v. Marx*, 99 N. Y. 377; *People v. Gillson*, 109 id. 389; *Matter of Jacobs*, 98 id. 98, 106; *People v. Arensberg*, 105 id. 123. *People v. West*, 106 id. 293, 297; *People v. Kibler*, Id. 321; Angell on Tide Waters, 21, 80, 107, 124; *Sloan v. Biemiller*, 34 Ohio St. 513, 514; 3 Kent's Com. 418; *Clould v. James*, 6 Cow. 369, 376; *Brookhaven v. Strong*, 60 N. Y. 56, 67; Hale's De Jure Maris, part 1, chap. 4; *In re Cheesebrough*, 78 N. Y. 237, 238; *In re D. C. Assn.*, 56 id. 569; *Wynehamer v. People*, 13 id. 378; *Rosevelt v. Godard*, 52 Barb. 534; *Rogers v. Jones*, 1 Wend. 259, 260; Const. of N. Y. Art. 1, §§ 1, 6; U. S. Const. [14th Amend.] 31; *People v. Otis*, 90 N. Y. 48, 52; *State v. F. F. Co.*, 6 Am. Rep. 510, 513.) Chapter 141, Laws of 1886, does

Statement of case.

not prohibit fishing in the waters of Black River bay. (*Sprague v. Birdsall*, 2 Cow. 419; *McManus v. Gavin*, 77 N. Y. 36; *Washington Cemetery v. P. P. & C. I. R. R. Co.* 68 id. 591; *Rockwell v. Nearing*, 35 id. 302, 312; *Bonnell v. Griswold*, 80 id. 128; *Van Valkenburg v. Torrey*, 7 Cow. 252; *French v. McMillan*, 26 Wkly. Dig. 46; *Strong v. Stebbins*, 5 Cow. 210; *Whittaker v. Masterton*, 106 N. Y. 277; *Carpenter v. People*, 8 Barb. 603, 605; *V. C. C. Co. v. Murtaugh*, 50 N. Y. 314; *B. & U. P. R. Co. v. Robbins*, 22 Barb. 662; *W. A. Co. v. Barlow*, 68 N. Y. 34; *Chase v. N. Y. C. R. R. Co.*, 26 id. 523, 525; *Whitney v. Baker*, 63 id. 62, 67; *Sherwin v. People*, 100 id. 362; *Coxson v. Doland*, 2 Daly, 66, 68; *Areson v. Areson*, 3 Den. 458; *Lambert v. People*, 76 N. Y. 220, 227.) The nets in question were not set in violation of any law for the protection of fish, and hence their seizure was not justified by chapter 591, Laws of 1880, as amended by chapter 317, Laws of 1883. (Laws of 1886, chap. 141; *V. C. C. Co. v. Murtaugh*, 50 N. Y. 314; *B. & N. P. Road v. Robbins*, 22 Barb. 662; *Hoyt v. Thompson*, 5 N. Y. 320, 340.) The state having conveyed away the land covered by Black River bay, the legislature had no power to prohibit fishing in its waters. (*Rogers v. Jones*, 1 Wend. 255-259; *People v. Thompson*, 30 Hun, 457, 459; *Trustees of Brookhaven v. Strong*, 60 N. Y. 56, 57, 71, 72; *Smith v. City of Rochester*, 92 id. 464, 477; *Palmer v. Hicks*, 6 Johns. 133; *Hooker v. Cummings*, 20 id. 91.)

Elon R. Brown for respondent. The right and duty to regulate, control and protect the fisheries in navigable waters along the shores of the ocean and of the great lakes has always been within the province of the state owning the adjacent territory. (*Smith v. Maryland*, 18 How. [U. S.] 71; *Smith v. Levinus*, 8 N. Y. 472; *Bank v. Richtmeyer*, 14 Johns. 255; *Hooker v. Cummings*, 20 id. 101; 1 Wend. 260; *Osgood's Case*, 6 City H. Rec. 4; *State v. Roberts*, 59 N. H. 256; 34 Ohio St. 492.) The state possesses ample authority to rid the fisheries of such devices as are destructive of them

Opinion of the Court, per ANDREWS, J.

without negotiations with or judicial proceedings against the offending owners who have constructed or placed such devices in the fisheries in violation of the law protecting the same. (*Phelps v. Racy*, 60 N. Y. 10; 13 Vr. [N. J.] 345; 97 Ill. 332, 337; *State v. Snover*, 342 N. J. L. 41; *Williams v. Blackwell*, 2 H. & C. 33; *Smith v. Levinus*, 8 N. Y. 472.) The legislature may, by virtue of its police power in the exercise of a reasonable discretion, declare that a nuisance which was not before a nuisance, or legalize a nuisance so that no one will have the right to abate it. (*Coe v. Shults*, 47 Barb. 65; *Matter of Jacobs*, 98 N. Y. 98, 108, 109; *Reg v. Crashow*, Bell, C. C. 303; 30 L. J. M. C. 58; *McLaughlin v. State*, 45 Ind. 338; *Munroe v. Grespach*, 33 La. Ann. 1011; *State v. Fowler*, 13 R. I. 661; *Miller v. Mayor, etc.*, 109 U. S. 385; *Leigh v. Westervelt*, 2 Duer, 618; *Harris v. Thompson*, 9 Barb. 350; *Griffith v. McCullum*, 46 id. 561; *Babcock v. City of Buffalo*, 36 N. Y. 268; *Hart v. Mayor, etc.*, 3 Paige, 213; *Harrower v. Ritson*, 37 Barb. 301; *Kellogg v. Thompson*, 66 N. Y. 88; *Rockwell v. Nearing*, 35 id. 302; *Wood on Nuisances*, 1; *State v. Snover*, 42 N. J. L. 341; *Williams v. Blackwell*, 2 H. & C. 33; Penal Code, § 385.) The fisheries in Lake Ontario are held by the state of New York in trust for the benefit of all her people, and the right and duty to regulate and control them spring from the obligations of this trust. (Penal Code, §§ 338, 345, 346.) The enactment of laws for the protection of fish in certain localities is constitutional. (*Phelps v. Racy*, 60 N. Y. 10; *State v. Roberts*, 59 N. H. 256; 47 Am. Rep. 199.) These nets were set with the intention of taking fish. This taking was in violation of chapter 141, Laws 1886, and was a crime. The attempt to commit a crime is a crime. (Penal Code, §§ 34, 686.) The nets were set in direct violation of law. (Laws of 1883, chap. 317, § 2.)

ANDREWS, J. The conclusions of the trial judge that Black River Bay is a part of Lake Ontario, within the meaning of chapter 146 of the Laws of 1886, and that the nets set therein

Opinion of the Court, per ANDREWS, J.

were set in violation of the act chapter 591 of the Laws of 1880, as amended by chapter 317 of the Laws of 1883, were affirmed by the General Term. The trial judge, in his careful opinion, demonstrated the correctness of these conclusions, and nothing can be added to reinforce the argument by which they were sustained.

The point of difference between the trial court and the General Term relates to the constitutionality of the second section of the act of 1880, as amended in 1883. That section is as follows: "Sec. 2. Any net found, or other means or device for taking or capturing fish, or whereby they may be taken or captured, set, put, floated, had, found or maintained in or upon any of the waters of this state, or upon the shores or islands in any waters of this state, in violation of any existing or hereafter enacted statutes or laws for the protection of fish, is hereby declared to be, and is a public nuisance, and may be abated and summarily destroyed by any person, and it shall be the duty of each and every (game and fish) protector aforesaid and of every game constable, to seize and remove and destroy the same, * * * and no action for damages shall be maintained against any person for or on account of any such seizure or destruction." The defendant justified the seizure and destruction of the nets of plaintiff, as a game protector, under this statute, and established the justification, if the legislature had the constitutional power to authorize the summary remedy provided by the section in question. The trial judge held the act in this respect to be unconstitutional, and ordered judgment in favor of the plaintiffs for the value of the nets. The General Term sustained the constitutionality of the statute and reversed the judgment. We concur with the General Term for reasons which will now be stated.

The legislative power of the state which by the Constitution is vested in the senate and assembly (§ 1, art. 3), covers every subject which in the distribution of the powers of government between the legislative, executive and judicial departments, belongs by practice or usage, in England or in this country, to the legislative department, except in so far as such power

Opinion of the Court, per ANDREWS, J.

has been withheld or limited by the Constitution itself, and subject also to such restrictions upon its exercise as may be found in the Constitution of the United States. From this grant of legislative power springs the right of the legislature to enact a criminal code, to define what acts shall constitute a criminal offense, what penalty shall be inflicted upon offenders, and generally to enact all laws which the legislature shall deem expedient for the protection of public and private rights, and the prevention and punishment of public wrongs. The legislature may not declare that to be a crime which in its nature is and must be under all circumstances innocent, nor can it in defining crimes, or in declaring their punishment, take away or impair any inalienable right secured by the Constitution. But it may, acting within these limits, make acts criminal which before were innocent, and ordain punishment in future cases where before none could have been inflicted. This, in its nature, is a legislative power, which, by the Constitution of the state, is committed to the discretion of the legislative body. (*Barker v. People*, 3 Cow. 686; *People v. West*, 106 N. Y. 293.) The act in question declares that nets set in certain waters are public nuisances, and authorizes their summary destruction. The statute declares and defines a new species of public nuisance, not known to the common law, nor declared to be such by any prior statute. But we know of no limitation of legislative power which precludes the legislature from enlarging the category of public nuisances, or from declaring places or property used to the detriment of public interests or to the injury of the health, morals or welfare of the community, public nuisances, although not such at common law. There are, of course, limitations upon the exercise of this power. The legislature cannot use it as a cover for withdrawing property from the protection of the law, or arbitrarily, where no public right or interest is involved, declare property a nuisance for the purpose of devoting it to destruction. If the court can judicially see that the statute is a mere evasion, or was framed for the purpose of individual oppression, it will set it aside as unconstitutional, but not other-

Opinion of the Court, per ANDREWS, J.

wise. (*In re Jacobs*, 98 N. Y. 98; *Mugler v. Kansas*, 123 U. S. 661.)

There are numerous examples in recent legislation, of the exercise of the legislative power to declare property held or used in violation of a particular statute, a public nuisance, although such possession and use before the statute was lawful. The prohibitory legislation relative to the manufacture or sale of intoxicating liquors, in various states, has in many cases been accompanied by provisions declaring the place where liquor is unlawfully kept for sale, as well as the liquor itself, a common or public nuisance, and while the validity of prohibitory statutes in their operation upon liquors lawfully acquired or held before their passage, and in respect of the procedure authorized thereby, have been the subject of much contention in the courts, the right of the legislature by a new statute to impose upon property held or used in the violation of law, the character of a public nuisance is generally admitted. (*Wynehamer v. People*, 13 N. Y. 378; *Fisher v. McGirr*, 1 Gray, 1; *Mugler v. Kansas*, *supra*.)

The legislative power to regulate fishing in public waters has been exercised from the earliest period of the common law. The statute 2 H. 6, C. 15 prohibited the use of nets in the Thames, if they obstruct navigation or the passage of fish. Lord Hale in his treatise (*De Jure Maris*, page 23), says that "the fishing which the subject has in this or any other public or private river, or creek, fresh or salt, is subject to the laws for the conservation of fish and fry, which are many." In this state many statutes have been enacted, commencing at an early period, regulating the right of fishing in the waters of the state, prohibiting the use of nets or the taking of fish at certain seasons, and for the protection of certain kinds of fish. (1 Rev. St. [Ed's. ed.] 687 *et seq.*; 4 *id.* 96 *et seq.*) It has become a settled principle of public law that power resides in the several states to regulate and control the right of fishing in the public waters within their respective jurisdictions. (*Smith v. Maryland*, 18 How. [U. S.] 71; *Hooker v. Cummings*, 20 Johns. 100; *Smith v. Levinus*, 8 N. Y. 472;

Opinion of the Court, per ANDREWS, J.

3 Kent Com. 415.) We think it was competent for the legislature, in exercising the power of regulation of this common and public right, to prohibit the taking of fish with nets in specified waters, and by its declaration, to make the setting of nets for that purpose a public nuisance. The general definition of a nuisance given by Blackstone is, "anything that worketh hurt, inconvenience, or damage." It is generally true, as stated by a recent writer (Wood on Nuisances, § 11), that nuisances arise from the violation of the common law, and not from the violation of a public statute. But this, we conceive, is true only where the statute creating a right or imposing an obligation affixes a penalty for its violation, or gives a specific remedy which by the terms of the statute or by construction is exclusive (See *Bulbrook v. Goodere*, 3 Burr. 1770.) But the principle stated has no application where the statute itself prescribes that a particular act or the property used for a noxious purpose, shall be deemed a nuisance. The legislature in the act in question, acting upon the theory and upon the fact (for so it must be assumed) that fishing with nets in prohibited waters is a public injury, have applied the doctrine of the common law to a case new in instance, but not in principle, and made the doing of the prohibited act a nuisance. This we think it could lawfully do.

The more difficult question arises upon the provision in the second section of the act of 1883, which authorizes any person, and makes it the duty of the game protector to abate the nuisance caused by nets set in violation of law, by their summary destruction. It is insisted that the destruction of nets by an individual, or by an executive officer so authorized, without any judicial proceeding, is a deprivation of the owner of the nets of his property, without due process of law, in contravention of the Constitution. The right of summary abatement of nuisances without judicial process or proceeding, was an established principle of the common law long before the adoption of our Constitution, and it has never been supposed that this common-law principle was abrogated by the provision for the protection of life, liberty and property in our state Constitution,

Opinion of the Court, per ANDREWS, J.

although the exercise of the right might result in the destruction of property. This question was referred to by SUTHERLAND, J., in *Hart v. Mayor, etc.* (9 Wend. 590). He said: "If this is a case in which the corporation or any other person had a right summarily to remove or abate this obstruction, then the objection that the appellants by this course of proceeding may be deprived of their property without due process of law, or trial by jury, has no application. Former legal proceedings and trial by jury are not appropriate to, and have never been used in such cases." (See, also, opinion of Edmonds, senator, in same case, page 609.) In the *License Tax Case* (5 How. [U. S.] 504), Judge McLEAN, speaking of this subject, said: "The acknowledged police power of a state often extends to the destruction of property. A nuisance may be abated. Everything prejudicial to the health and morals of a city may be removed." In *Rockwell v. Nearing* (35 N. Y. 308), PORTER, J., speaking of the constitutional provision, said "there were many examples of summary proceedings which were recognized as due process of law at the date of the Constitution, and to them the prohibition has no application." Quarantine and health laws have been enacted from time to time from the organization of our state government, authorizing the summary destruction of infected cargo, clothing or other articles, by officers designated, and no doubt has been suggested as to their constitutionality. In *Hart v. Mayor, etc.* (*supra*), a question was raised as to the validity of a city ordinance, subjecting a float moored in the Albany basin to summary seizure and sale upon failure of the owner to remove the same after notice. The court held the ordinance to be void as not within the power conferred upon the city by its charter, but it was held that the common law right of abatement existed, although the removal of the float in question involved its destruction. *Van Wormer v. Mayor, etc.* (15 Wend. 263), sustained the right of a municipal corporation to dig down a lot in the city, to abate a nuisance although in the process of abatement buildings thereon were pulled down. In *Meeker v. Van Rensselaer* (15 Wend. 397), the court justified the act of the defendant as an individual

Opinion of the Court, per ANDREWS, J.

citizen, in tearing down a filthy tenement house which was a nuisance, to prevent the spread of the Asiatic cholera.

These authorities sufficiently establish the proposition that the constitutional guaranty does not take away the common law right of abatement of nuisances by summary proceedings, without judicial trial or process. But in the process of abating a nuisance there are limitations both in respect of the agencies which may be employed, and as to what may be done in execution of the remedy. The general proposition has been asserted in text-books and repeated in judicial opinions, that any person may abate a public nuisance. But the best considered authorities in this country and England now hold that a public nuisance can only be abated by an individual where it obstructs his private right, or interferes at the time with his enjoyment of a right common to many, as the right of passage upon the public highway, and he thereby sustains a special injury. (*Brown v. Perkins*, 12 Gray, 89; *Mayor of Colchester v. Brooke*, 7 Ad. & El. 339; *Dimes v. Petley*, 15 *id.* 276; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Harrower v. Ritson*, 37 Barb. 301.)

The public remedy is ordinarily by indictment for the punishment of the offender, wherein on judgment of conviction the removal or destruction of the thing constituting the nuisance, if physical and tangible, may be adjudged, or by bill in equity filed in behalf of the people. But the remedy by judicial prosecution, *in rem* or *in personam*, is not, we conceive, exclusive, where the statute in a particular case gives a remedy by summary abatement, and the remedy is appropriate to the object to be accomplished. There are nuisances arising from conduct, which can only be abated by the arrest and punishment of the offender, and in such cases it is obvious that the legislature could not directly direct the sheriff or other officer to seize and flog or imprison the culprit. The infliction of punishment for crime is the prerogative of the court and cannot be usurped by the legislature. The legislature can only define the offense and prescribe the measure of punishment, where guilt shall have been judicially ascer-

Opinion of the Court, per ANDREWS, J.

tained. But as the legislature may declare nuisances, it may also, where the nuisance is physical and tangible, direct its summary abatement by executive officers, without the intervention of judicial proceedings, in cases analogous to those where the remedy by summary abatement existed at common law. MARVIN, J., in his able opinion in *Griffith v. McCullum* (46 Barb. 561), speaking of the remedy for the abatement of nuisances, says: "That which is exclusively a common law or public nuisance, cannot be abated by the private acts of individuals. The remedy is by indictment or criminal prosecution, unless the statute has provided some other remedy." The cases of *Hart v. Mayor, etc.* (*supra*), *Van Wormer v. Albany* (*supra*), and *Meeker v. Van Rensselaer* (*supra*), show that the public remedy is not in all cases confined to a judicial prosecution.

But the remedy by summary abatement cannot be extended beyond the purpose implied in the words, and must be confined to doing what is necessary to accomplish it. And here lies, we think, the stress of the question now presented. It cannot be denied that in many cases a nuisance can only be abated by the destruction of the property in which it consists. The cases of infected cargo or clothing and of impure and unwholesome food are plainly of this description. They are nuisances *per se*, and their abatement is their destruction. So, also, there can be little doubt, as we conceive, that obscene books or pictures, or implements only capable of an illegal use, may be destroyed as a part of the process of abating the nuisance they create, if so directed by statute. The keeping of a bawdy house, or a house for the resort of lewd and dissolute people, is a nuisance at common law. But the tearing down of the building so kept, would not be justified as the exercise of the power of summary abatement, and it would add nothing, we think, to the justification that a statute was produced authorizing the destruction of the building summarily as a part of the remedy. The nuisance consists in the case supposed in the conduct of the owner or occupants of the house, in using or allowing it to be used for the immoral

Opinion of the Court, per ANDREWS, J.

purpose, and the remedy would be to stop the use. This would be the only mode of abatement in such case known to the common law, and the destruction of the building for this purpose would have no sanction in common law or precedent. (See *Babcock v. City of Buffalo*, 56 N. Y. 268; *Barclay v. Commonwealth*, 25 Penn. St. 503; *Ely v. Board of Supervisors*, 36 N. Y. 297.)

But where a public nuisance consists in the location or use of tangible personal property, so as to interfere with or obstruct a public right or regulation, as in the case of the float in the Albany basin (9 Wend. 571), or the nets in the present case, the legislature may, we think, authorize its summary abatement by executive agencies without resort to judicial proceedings, and any injury or destruction of the property necessarily incident to the exercise of the summary jurisdiction, interferes with no legal right of the owner. But the legislature cannot go further. It cannot decree the destruction or forfeiture of property used so as to constitute a nuisance as a punishment of the wrong, nor even, we think, to prevent a future illegal use of the property, it not being a nuisance *per se*, and appoint officers to execute its mandate. The plain reason is that due process of law requires a hearing and trial before punishment, or before forfeiture of property can be adjudged for the owner's misconduct. Such legislation would be a plain usurpation by the legislature of judicial powers, and under guise of exercising the power of summary abatement of nuisances, the legislature cannot take into its own hands the enforcement of the criminal or *quasi* criminal law. (See opinion of SHAW, Ch. J., in *Fisher v. McGirr*, *supra*, and in *Brown v. Perkins*, 12 Gray, 89.)

The inquiry in the present case comes to this: Whether the destruction of the nets set in violation of law, authorized and required by the act of 1883, is simply a proper, reasonable and necessary regulation for the abatement of the nuisance, or transcends that purpose, and is to be regarded as the imposition and infliction of a forfeiture of the owners' right of property in the nets, in the nature of a punishment. We

Opinion of the Court, per ANDREWS, J.

regard the case as very near the border line, but we think the legislation may be fairly sustained on the ground that the destruction of nets so placed is a reasonable incident of the power to abate the nuisance. The owner of the nets is deprived of his property, but not as the direct object of the law, but as an incident to the abatement of the nuisance. Where a private person is authorized to abate a public nuisance, as in case of a house built in a highway, or a gate across it, which obstructs and prevents his passage thereon, it was long ago held that he was not required to observe particular care in abating the nuisance, and that although the gate might have been opened without cutting it down, yet the cutting down would be lawful. (*Lodie v. Arnold*, 2 Salk. 458, and cases cited.) But the general rule undoubtedly is that the abatement must be limited by necessity, and no wanton and unnecessary injury must be committed (3 Bl. 6, note.) It is conceivable that nets illegally set could, with the use of care, be removed without destroying them. But in view of their position, the difficulty attending their removal, the liability to injury in the process, their comparatively small value, we think the legislature could adjudge their destruction as a reasonable means of abating the nuisance.

These views lead to an affirmance of the order of the General Term. The case of *Weller v. Snover* (42 N. J. L. 341) tends to sustain the conclusion we have reached. The action in that case was trespass, for entering the plaintiff's lands, bordering a non-navigable stream in New Jersey, and destroying a fish basket placed in the waters diverted therefrom, for the catching of fish, contrary to a statute. The court held the statute to be a justification. The case of *Williams v. Blackwall* (2 Hurlst. & Colt. 33) arose under an act of Parliament which authorized the summary destruction by fish wardens, of what was known as salmon engines, being fish nets set in violation of the act. The case is not an authority upon the power of our legislature under the limitations of the state Constitution, but the legislation upon which the action was founded shows that in a country governed by the principles of *Magna*

Statement of case.

Charta, such legislation is not deemed inconsistent with the fundamental doctrines of civil liberty.

It is insisted that the provision in the act of 1883, authorizes the destruction of nets found on the land, on shores or islands adjacent to waters, where taking of fish by nets is prohibited, and that this part of the statute is in any view unconstitutional. Assuming this premise it is claimed that the whole section must fall, as the statute, if unconstitutional as to one provision, is unconstitutional as a whole. This is not, we think, the general rule of law, where provisions of a statute are separable, one of which only is void. On the contrary the general rule requires the court to sustain the valid provisions, while rejecting the others. Where the void matter is so blended with the good that they cannot be separated, or where the court can judicially see that the legislature only intended the statute to be enforced in its entirety, and that by rejecting part the general purpose of the statute would be defeated, the court, if compelled to defeat the main purpose of the statute, will not strive to save any part. (See *Fisher v. McGirr, supra.*)

The order granting a new trial should be affirmed and judgment absolute ordered for the defendant on the stipulation, with costs.

All concur, except O'BRIEN, J., not sitting.

Order affirmed and judgment accordingly.

JOHN DANAHER, as Administrator, etc., Appellant, v. THE
CITY OF BROOKLYN, Respondent.

In an action to recover damages for the death of D., plaintiff's intestate, alleged to have been caused by drinking unwholesome water from a well, used gratuitously by the public, belonging to defendant, and under its control, it was not claimed either that the well or pump was improperly constructed or out of repair, that the water became unwholesome from any defect in the well, or from any external exposure which could, by any reasonable care, have been avoided; that defendant, or any of its officers, or anyone, did anything to render the water impure;

Statement of case.

that anything could have been done to purify it or prevent its impurity which could only be discovered by a careful chemical analysis; or that defendant, prior to the death of D., had notice of the unwholesome character of the water. The well had been extensively used for years, and there was no proof that prior to August, 1882, the water had caused any injury. D. died August 24, 1882. The plaintiff was nonsuited. *Held*, no error; that while it was the duty of defendant to use reasonable diligence to keep the well in repair and to guard against any dilapidation or danger resulting from its use, it was not an insurer of the quality of the water, and to authorize a recovery it was necessary for plaintiff to show willful misconduct or culpable neglect, and this the evidence failed to do.

Milnes v. Mayor, etc. (L. R. [10 Q. B. Div.] 124; 12 id. 443); *Vosper v. Mayor, etc.* (17 J. & S. 296); *Howard v. Legg* (11 N. E. 614); *Jones v. New Haven* (34 Conn. 13); *Norristown v. Moyer* (67 Penn. St. 355); *People v. Albany* (11 Wend. 539); *Nevins v. City of Peoria* (41 Ill. 502); *Shawneetown v. Mason* (82 Ill. 337); *Rex v. Medley* (6 C. & P. 292); *Goldsmid v. T. W. I. Co.* (L. R. [1 Eq. Cas.] 161); *Charles v. F. L. Board* (52 L. J. [N. S.] 554); *Brown v. Illius* (27 Conn. 84); *Ballard v. Tomlinson* (L. R. [29 Ch. Div.] 115), distinguished.

(Argued January 15, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made September 11, 1889, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at circuit.

This action was brought to recover damages for the death of Thomas P. Danaher, plaintiff's intestate, alleged to have been caused by drinking from a public well belonging to the defendant, the water from which was poisonous and unwholesome. The deceased died August 24, 1882, from typhoid dysentery.

The material facts are stated in the opinion.

Franklin M. Danaher for appellant. The trial court erred in directing a nonsuit. (*Bagley v. Bowe*, 105 N. Y. 179; *Payne v. T. & B. B. N. Co.*, 83 N. Y. 574; *Barnes v. Snowden*, 12 Atl. 304-307; *Walton v. Ackerman*, 10 id. 709; *Stackus v. N. Y. C. & H. R. R. R. Co.*, 79 N. Y. 466;

Statement of case.

Hart v. B. Co., 80 id. 662; *Tuft v. City of Troy*, 18 Wkly. Dig. 478; *Carl v. Ayers*, 53 N. Y. 17; *Rehberg v. Mayor, etc.*, 91 id. 141; *Cook v. N. Y. C. R. R. Co.*, 1 Abb. Ct. App. Dec. 432; *Clemence v. City of Auburn*, 66 N. Y. 338; *Ernst v. H. R. R. R. Co.*, 35 id. 41; *Bernhart v. R. & S. R. R. Co.*, 1 Abb. Ct. App. Dec. 134; *Weber v. N. Y. C. & H. R. R. R. Co.*, 58 N. Y. 455; *Morrison v. N. Y. C. & H. R. R. R. Co.*, 63 id. 643; *Powell v. Powell*, 71 N. Y. 71; *Fitzpatrick Case*, 21 W. D. 98; 98 N. Y. 649; *Donnelly v. B. C. R. R. Co.*, 109 id. 22; *Gonzalez v. R. R. Co.*, 38 id. 440; *Neundorf v. Ins. Co.* 69 id. 393; Baylies' N. T. & App. 504, 505.) The city of Brooklyn is charged by law with the duty of maintaining and repairing its public wells and pumps within its corporate limits. (Laws of 1873, chap. 863; 1 Blackstone's Com. 147; Laws of 1880, chap. 377, §§ 1-6; *Weed v. Brockport*, 16 N. Y. 170; *Fitzpatrick v. Slocum*, 89 N. Y. 365; *N. Y. & B. L. M. & L. Co. v. Brooklyn*, 71 id. 583-4; *Walsh v. New York*, 107 id. 220; *Ehrgott v. Mayor, etc.*, 96 id. 272-3; *Barnes v. Dist. of Col.*, 91 U. S. 540; *Polley v. Buffalo*, 20 W. D. 163; *Kunz v. City of Troy*, 104 N. Y. 344-8.) The city of Brooklyn furnishes drinking water to its inhabitants, in its private as distinguished from its public capacity, and is liable for a failure to use its power well or for an injury caused by using it badly, and for negligence, the same as an individual under similar circumstances. (*Maximilian v. Mayor, etc.*, 62 N. Y. 160-164; 1 S. & R. on Neg. [4th ed.] § 255; Cooley's Const. Lim. 306; *Conrad v. Ithaca*, 16 N. Y. 158; *Small v. Inhabitants*, 51 Me. 362; *G. Co. v. San Francisco*, 9 Cal. 453; *Lloyd v. Mayor, etc.*, 5 N. Y. 374; *Bailey v. Mayor, etc.*, 3 Hill, 331; *Oliver v. Worcester*, 102 Mass. 500; *City of Detroit v. Cary*, 9 Mich. 165; 4 Wait's Act and Def. 596, 615; Dillon on Mun. Corp. [3d ed.] § 58; Wharton on Neg. §§ 250, 251; 2 Addison on Torts, 1300; *Barnes v. Dist. of Col.*, 91 U. S. 540; *Weightman v. Washington*, 1 Black, 39; *Richards v. Mayor, etc.*, 16 J. & S. 315; *Nebraska City v. Campbell*, 2 Black, 590; *Bailey v. Mayor of N. Y.*, 3 Hill, 531; 23 N. Y. 325; 53 id. 141; *McEvoy v. Mayor*,

Statement of case.

etc., 54 How. Pr. 245; *Benson v. Mayor, etc.*, 16 Barb. 223, 235; *Fleming v. Suspension Bridge*, 92 N. Y. 372; *Peo. v. Civil Service of N. Y.* 17 Abb. [N. C.] 64; *Britton v. Mayor, etc.*, 21 How. Pr. 253; *Milhau v. Sharp*, 15 Barb. 193, 213; *Lowber v. Mayor, etc.*, 5 Abb. 251, 268; *Remney v. Gedney*, 57 How. Pr. 221; *W. S. F. Society v. Philadelphia*, 31 Penn. St. 183; *People v. Hulbert*, 24 Mich. 44, 103; *Board v. Detroit*, 28 id. 202, 238; *Intendent v. Pippin*, 31 Ala. 542; *Mayor, etc., v. Cabot*, 28 Ga. 50; *Wells v. Mayor*, 43 id. 67; *McKnight v. New Orleans*, 24 La. Ann. 412; *Grant v. Davenport*, 36 Iowa, 396; *Hale v. Haughton*, 8 Mich. 458; *Indianapolis v. G. Co.*, 66 Ind. 396; 9 Cal. 453; 14 Gray, 543; 102 Mass. 500; 36 N. H. 284-291.) The city having erected the pumps, assumed the duty of keeping them in repair, and for negligence in not so doing, is liable the same as an individual. (Cooley on Const. Lim. [5th ed.] 310; *Henly v. Mayor, etc.*, 5 Bing. [N. C.] 91, 222; 4 Wait's Act. & Def. 641; Dillon on Mun. Corp. [3d ed.] §§ 1048, 1049; Wharton on Neg. §§ 250, 251, 263; Addison on Torts, 1304-5, 1311-13; *Barnes v. Dist. Columbia*, 91 U. S. 540; 36 N. Y. 54; 46 id. 196; 32 id. 489; 50 id. 238; 5 id. 374-5; 59 id. 500; 1 Denio, 595; 3 N. Y. 463; 3 Hill, 612; Id. 531; 61 Barb. 511; 9 N. Y. 163, 169; 3 Duer, 406; 51 N. Y. 506; 2 id. 173; 24 Hun, 12; 29 id. 528; 126 Mass. 324; 104 id. 13; 109 id. 107; 4 Allen, 41-51; 37 Mich. 153; 10 Abb. [N. S.] 192; *Gray v. City of Brooklyn*, 59 N. Y. 500-508; *Weightman v. Washington*, 1 Black, 39; *Nebraska City v. Campbell*, 2 id. 590-2; *Hardy v. City of Brooklyn*, 90 N. Y. 441; *Urquhart v. City of Ogdensburg*, 91 id. 67-71; *Siefert v. City of Brooklyn*, 101 id. 136.) It was the duty of the city to investigate the condition of its wells and pumps and a failure to do so was negligence. (*McCarthy v. Syracuse*, 46 N. Y. 194; *Brusso v. Buffalo*, 90 id. 679; *Jones v. New Haven*, 34 Conn. 6; *Rehrberg v. Mayor, etc.*, 91 N. Y. 138, 145; *City v. Crawford*, 53 Am. Rep. 753; *Vosper v. Mayor*, 17 J. & S. 296; *Requa v. Rochester*, 45 N. Y. 129; 36 id. 54; 61 id. 506; *State v. Portland*, 43 Am. Rep. 586; *Chicago v. Mayor, etc.*, 18 Ill. 349; *Vanderslice*

Statement of case.

v. *Philadelphia*, 28 A. L. J. 591; Addison on Torts, 1312, 1313; Wharton on Neg. §§ 291, 963, 965; 3 T. & C. 504, 505; 67 Penn. St. 355; 82 Mass. 508; *County v. Howard*, 11 N. E. 612; *Post v. Clark*, 35 Conn. 342; *Hunt v. Mayor, etc.*, 20 J. & S. 198; 109 N. Y. 134.) Notice of a defective condition is presumed when ignorance is not compatible with the exercise of reasonable official care. (*Dotton v. Albion*, 15 N. W. Rep. 46; *City of Boulder v. Niles*, 12 Pac. Rep. 632; *Chicago v. Dalle*, 5 N. E. Rep. 572; *Hancomb v. Boston*, 141 Mass. 242-5.) When the accident is such as in the ordinary course of events does not happen if reasonable care is used, in the absence of explanation it affords sufficient evidence that the accident arose from want of care on its part. (*Breen v. N. Y. C. R. R. Co.*, 109 N. Y. 297; *Milnes v. Mayor of Huddersfield*, L. R. [10 Q. R. Div.] 124; 12 id. 443; *Chapman v. City of Rochester*, 110 N. Y. 273; *Van Wormer v. Mayor, etc.*, 15 Wend. 203-205.) It is no excuse that the pump water was outwardly pure and its poisoned condition not manifest to ordinary observation. The city is chargeable with notice of the operations of the natural law of decay. It was its duty to anticipate dilapidation and decay; to inspect the well, and call to its assistance those whose skill would have enabled it to ascertain its condition. (*Vosper v. Mayor, etc.*, 17 J. & S. 296; *County of Howard v. Legg*, 11 N. E. Rep. 614; *Indianapolis v. Scott*, 72 Me. 197; *Rapho v. Moore*, 68 Penn. St. 408; *Jones v. New Haven*, 34 Conn. 13; 74 N. Y. 273; 91 id. 145; *Rehrberg v. Mayor, etc.*, 91 id. 145.) The city ought to have foreseen that such a condition of its drinking water might occur, and the omission to provide against it is actionable negligence. (*Loftus v. U. F. Co.*, 84 N. Y. 460.) There was sufficient evidence of notice to the city of the poisonous condition of this water. (*Bagley v. Bowe*, 105 N. Y. 179; *Turner v. Newburgh*, 109 id. 301; Dillon on Mun. Corp. § 144, 237, 262; *Rehrberg v. Mayor*, 91 N. Y. 138-145; *Tibogood v. Mayor, etc.*, 102 id. 216-219.) The court erred in dismissing the complaint for want of notice, as the pump was a city structure erected and maintained by the defendant for drinking

Statement of case.

purposes. The water in it having become impure, poisonous and dangerous to human life and health, it was a public nuisance, and the municipality is liable for all damages sustained by reason of its existence, in tort, for the wrongful act of maintaining it, irrespective of any question of negligence or notice. (*Shawneetown v. Mason*, 82 Ill. 337-341; *Hamilton v. Mayor, etc.*, 52 Ga. 435; *Nevins v. City of Peoria*, 41 Ill. 502; *People v. City of Albany*, 11 Wend. 539, 543; Wood on Nuisance, §§ 784, 833; Gould on Waters, § 212; *Mills v. Hall*, 9 Wend. 315; Wood on Nuisances, 749, § 784; 4 Wait's Act. & Def. 765; Addison on Torts, 1315; Wharton on Neg. §§ 187, 259, 265; *Brower v. Mayor, etc.*, 3 Barb. 254; *Irvine v. Wood*, 51 N. Y. 224-8; *Congreve v. Smith*, 18 id. 79, 82-4; *Hume v. Mayor, etc.*, 74 id. 264; *Clifford v. Dam*, 81 id. 52; *Dickinson v. Mayor, etc.*, 92 id. 588; *Creed v. Hartman*, 29 id. 585; Laws of 1873, chap. 863, § 13; *Wormsley v. Church*, 17 L. T. [N. S.] 190; *Hodgkinson v. Ennor*, 4 B. & S. 229; *Whailey v. Lang*, 3 H. & N. 675; *Chapman v. Rochester*, 110 N. Y. 273.) The court erred in taking the case from the jury for want of proof of notice, because the defendant is liable in tort for furnishing impure and poisonous drinking water, upon the ground of a violated or neglected duty voluntarily assumed, irrespective of any question of negligence or notice, or of any privity of contract between the parties. (*Norton v. Sewell*, 106 Mass. 143; *Bishop v. Weber*, 139 id. 417; *Fitzpatrick v. G. & W. P. F. Co.*, 49 Hun, 288.) The city erected and maintained the pump and assumed the duty of providing for the health, safety and protection of its citizens who drank of this water, and is liable for any injuries sustained by such person by reason of the poisonous condition of the water, irrespective of any question of notice or negligence. (*Archer v. N. Y., etc., R. R. Co.*, 106 N. Y. 589, 597; *Turner v. Newburgh*, 109 id. 301; *Jetter v. H. R. R. Co.*, 2 Abb. Ct. App. Dec. 458; *Weston Case*, 73 N. Y. 595; *Brassell Case*, 84 id. 246; *Newson Case*, 29 id. 383, 390; *Chaffee Case*, 104 Mass. 107, 115; *Brusso v. Buffalo*, 90 N. Y. 679; *McGuire v. Spence*, 91 id. 303; *Todd v. City of Troy*, 61 id. 510; *Barton*

Statement of case.

v. *City of Syracuse*, 36 id. 55; *Weston v. E. R. R. Co.*, 73 id. 595; 18 Ill. 349; *Hazeman v. Hoboken*, 50 N. Y. 60; *Cilbert v. Hoffman*, 32 N. W. 632; *Bishop v. Weber*, 139 Mass. 417; 11 N. E. Rep. 612; 2 S. E. Rep. 627; 13 Pac. Rep. 657; 19 Wkly. Dig. 76; 20 id. 7, 8, 9; 16 id. 222; *Jennings v. Van Schaick*, 37 Alb. L. J. 292; *Indiana v. Barnhart*, 16 N. E. Rep. 121-125; *Marcellis v. Howland*, Id. 883; *Requa v. Rochester*, 45 N. Y. 134; *Fitzpatrick v. G. & W. P. F. Co.*, 49 Hun, 288; *McMahon v. Mayor*, 33 N. Y. 642; 38 id. 459; *Birkett v. K. I. Co.*, 110 id. 504; *Mangan v. B. R. R. Co.*, 38 N. Y. 461; *McGarry v. Loomis*, 63 id. 108; *Fallon v. Central Park*, 64 id. 13, 17; *Chicago v. Mayor, etc.*, 18 Ill. 349; *Chicago v. Hessing*, 83 id. 204; *Drew v. R. R. Co.*, 26 N. Y. 49; *Kunz v. City of Troy*, 104 id. 251; *Dorlon v. N. Y. C. & H. R. R. Co.*, 90 id. 670, 671; *Bryne v. R. R. Co.*, 83 id. 620; *Reynolds' Case*, 58 id. 248; *Thurber v. Harlem*, 60 id. 326; *Mangan v. R. R. Co.*, 38 id. 458; *Wendell v. R. R. Co.*, 91 id. 420; 24 How. Pr. 17; 17 Wkly. Dig. 33; Abb. T. Ev. 597; 44 Am. Rep. 586; 42 id. 418; *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 229; *Drew v. R. R. Co.*, 26 id. 49; *McGovern v. R. R. Co.*, 67 id. 421; *Morrison v. R. R. Co.*, 63 id. 614; *Johnson v. R. R. Co.*, 20 id. 45; *Hart v. B. Co.*, 80 id. 622.) The motion to dismiss the complaint "because no action lies against the city of Brooklyn for want of repair, or acts of the department of public health, in the discharge of this quasi-governmental duty," was properly denied. (Dillon on Mun. Corp. § 144; *Board of Health v. Heister*, 37 N. Y. 671, 672; *Kunz v. City of Troy*, 104 N. Y. 344; *Walsh v. Mayor, etc.*, 107 id. 224; *Ehrgott v. Mayor, etc.*, 96 id. 264; *Mills v. City of Brooklyn*, 32 id. 494; *N. Y. & C. Co. v. City of Brooklyn*, 71 id. 583; *Fitzpatrick v. Slocum*, 89 id. 363, 366; *Polly v. City of Buffalo*, 20 Wkly. Dig. 163; *Vincent v. City of Brooklyn*, 31 Hun, 122; *Fitzgerald v. City of Binghamton*, 40 Hun, 332; *Weed v. City of Brockport*, 16 N. Y. 160.) The motion to dismiss the complaint because "the city is not

Statement of case.

liable under the exemption clause of its charter" was properly denied. (*Billin v. City of Brooklyn*, 9 N. Y. S. R. 690; *Fitzpatrick v. Slocum*, 89 N. Y. 365; *Barnes v. Dist. Col.*, 91 U. S. 540; *McAvoy v. Mayor, etc.*, 54 How. Pr. 245; 3 T. & C. 505; 3 Hill, 531; *Ehrgott v. Mayor, etc.*, 96 N. Y. 265-272, 273; Laws of 1816, chap. 95; Laws of 1827, chap. 155, §§ 13, 23; Laws of 1833, chap. 319; Laws of 1834, chap. 92, § 23; Laws of 1850, chap. 47, § 26; Laws of 1854, chap. 384, § 1; Laws of 1865, chap. 721; *Adsit v. Gray*, 4 Hill, 304; 40 Am. Dec. 305; *Bennett v. Whitney*, 94 N. Y. 308; *Hines v. Lockport*, 50 id. 238; *Getty v. Staintin*, 46 Hun, 1-5; *Hover v. Barkhoff*, 44 N. Y. 113-118; 78 id. 314; Whart. on Neg. § 191; 16 N. Y. 170; *Sage v. City of Brooklyn*, 89 id. 189, 200; *Fitzpatrick v. Slocum*, 89 id. 358; *Hardy v. City of Brooklyn*, 90 id. 435; *Seifert v. City of Brooklyn*, 101 id. 136; *Vincent v. City of Brooklyn*, 31 Hun, 122; *Fitzgerald v. City of Binghamton*, 40 id. 332.) The court erred in refusing to allow the plaintiff to submit to the jury the question as to whether the use of this well water caused the death in question. (*Bagley v. Bowe*, 105 N. Y. 179; *Payne v. R. R. Co.*, 83 id. 574; *Stackus v. R. R. Co.*, 79 id. 466; *Hart v. H. R. B. Co.*, 80 id. 622; *Carl v. Ayers*, 53 id. 17; *Clemence v. City of Auburn*, 66 id. 388; *Justice v. Lang*, 52 id. 323; *White v. B. & A. R. R. Co.*, 11 N. E. Rep. 552-554.) This is not a case of *damnum absque injuria*. (*Seifert v. City of Brooklyn*, 101 N. Y. 136-144; *Ratcliff v. Mayor, etc.*, 4 id. 195.) The court erred in excluding the record evidence of the condition of this water contained in the minutes of the common council and of the department of health, and compelling plaintiff to make common law proof of facts which were of public record. (Laws of 1880, chap. 545, § 2; Code Civ. Pro. §§ 933, 941; *Denning v. Roome*, 6 Wend. 651; *Wood v. Jefferson*, 9 Cow. 205; *Turnpike Co. v. McKean*, 10 Johns. 154; Laws of 1878, chap. 219; Laws of 1879, chap. 211, 531; 1 Dillon on Mun. Corp. 373, 414, 422; *Meeker v. Van Rensselaer*, 15 Wend. 400; *Van Wormer v. Mayor, etc.*, Id. 262; *Napman v. People*, 19 Mich. 352.) The trial court

Opinion of the Court, per EARL, J.

erred in excluding evidence of the cost and expenses of the dead child's sickness. (*Murphy v. R. R. Co.*, 88 N. Y. 446; *Leeds v. M. G. Co.*, 90 id. 29; *Metcalf v. Baker*, 57 id. 662; *West v. M. R. Co.*, 1 N. Y. Supp. 519; *Cuming v. B. R. R. Co.*, 109 N. Y. 97.)

Almet F. Jenks for respondent. The plaintiff failed to make out a case irrespective of the question of municipal liability. (*Searles v. M. R. R. Co.*, 101 N. Y. 661; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 id. 332.) The city is not an insurer. There must be notice, actual or constructive. (*Todd v. City of Troy*, 61 N. Y. 509.) There was not sufficient proof of any negligence on the part of the city to warrant a refusal to dismiss the complaint. (*Wiles v. H. R. R. Co.*, 24 N. Y. 433; *Johnson v. H. R. R. Co.*, 20 id. 65; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 id. 333; *Wendell v. N. Y. C. & H. R. R. Co.*, 91 id. 420; *Reiseman v. Havermann*, 84 id. 647.) In any view of the case there was no liability of the city of Brooklyn. (Laws of 1875, chap. 633, tit. 12, § 1, p. 794; 2 Common Council Minutes, 1875, 807, 819; 2 id. 1887, 872; Documents, 1877, 1089; *Marmilian v. Mayor, etc.*, 62 N. Y. 160; *Bamber v. City of Rochester*, 97 N. Y. 625; *Ogg v. City of Lansing*, 14 Am. Rep. 499; *Heiser v. Mayor, etc.*, 104 N. Y. 68.) The fact that the city officers acted on the report that the water was unwholesome is immaterial. (*Hunt v. Mayor, etc.*, 109 N. Y. 134; 16 N. E. Rep. 320.) The doubts of an expert are not admissible in evidence. (*Sanchez v. People*, 22 N. Y. 137.)

EARL, J. We entertain no doubt that this well in DeKalb avenue was a public well belonging to the defendant and under its control, and that the water of the well was in August, 1882, unwholesome and dangerous to the health of such persons as should drink thereof; and we will assume (although we would hold so with some hesitation), that the death of plaintiff's intestate was caused by drinking of the water; and yet we think the plaintiff was properly nonsuited at the trial.

Opinion of the Court, per EARL, J.

There is no claim that the well or pump was improperly constructed, or out of repair, or that the water became unwholesome from any defect in the well or pump, or from any external exposure which could by any reasonable care have been avoided. It does not appear that the city, or any of its officers, or in fact that any person did anything to render the water impure. Nor does it appear that anything could have been done to purify it or prevent its impurity. The theory of the plaintiff, as developed upon the trial, was that this well was supplied by water which fell upon the surface of the surrounding earth and, by percolation through the soil, reached the bottom of the well; and that the water, upon the earth or in passing through the earth, came in contact with the unclean and deleterious substances which rendered it impure and unwholesome. The water was limpid, cold and agreeable to the taste. Its impurity could not be detected by drinking it, and its dangerous character could only be discovered by a careful chemical analysis.

This water was not furnished for a compensation paid for its use, and so there was no contract relation between the city and those who used it. The well was for public gratuitous use, and hence nothing that was said or intimated in *Milnes v. Mayor of Huddersfield* (L. R. [10 Q. B. Div.] 124; 12 id. 443) has any pertinency here.

The city was not an insurer of the quality of the water and bound under all circumstances to keep it pure and wholesome. This is not claimed. It owned this well as it owned its other property kept for public use, such as streets, parks and public buildings; and it owed the duty of reasonable diligence to care for it as it was bound to care for such other property. Its liability for unwholesome water in any of its public wells must rest upon negligence; and hence we are brought to the question, was there any proof of negligence imputable to the city? It is not claimed that the city had any notice of the unwholesome character of this water prior to the death of plaintiff's intestate; but the claim is that by reasonable diligence it could have had notice, and hence that notice must be imputed to it.

This well had existed for many years, and its water had been extensively used by persons in the neighborhood and there is no proof whatever that prior to the month of August, 1882, it had caused injury to anyone, or that there was the least suspicion by anyone that it was unwholesome. Several persons were called as witnesses by the plaintiff who testified that they became sick from drinking the water of this well in the early part of August, 1882. It is inferable from the evidence that the same persons drank the water previously with impunity. The plaintiff had four sons; three of them drank the water in the early part of August and became very sick, two of them dying. They had previously for years drank it without injury. The fourth son drank it down to about the first of August, and then in consequence of his absence from the city he ceased to drink it and he did not become sick. The inference therefore is, so far as there is any proof upon which to base it, that the water was wholesome, at least not dangerous and not so impure as to cause sickness, down to the first of August. In view of these facts it certainly cannot be said that there is any proof that the water was dangerous before the time it is shown to have caused any injury.

The plaintiff, claiming that the water of this well had for a long time been impure and dangerous, should have given some proof to maintain his claim, and if the claim was well founded it cannot be doubted that the proof would have been readily obtainable, as many persons must have used the water for many years.

So, while there is no proof that during any considerable time prior to the drinking of this water by the plaintiff's intestate, it had been impure, unwholesome or dangerous, there is no proof that any reasonable diligence on the part of the defendant would have discovered its impure or dangerous quality if it existed. The plain inference is that there was some cause of contamination which had not long existed. There must have been some unobserved deposit of deleterious matter at some distance from the well upon or under the sur-

Opinion of the Court, per EARL, J.

face of the soil, or some new vein opened in the soil through which impure water for the first time percolated into the well in the early part of August. There is no proof or claim that any improper or poisonous substance had been thrown into the well or that the well was unclean or needed cleaning out. Assuming that the defendant was bound to make a chemical analysis of the water of its wells from time to time, how often should such analysis be made? It appears that there were 296 wells within the city limits belonging to the city. To analyze the waters of all these wells would take a long time. If the defendant were required to do it even once a quarter it would probably take the whole time of a single chemist.

But if the chemical analysis of the water of this well had been made in June, or even in July, there is no proof, and there can be no legal inference that it would have been found unwholesome; and how then can it be said that at the precise time the deceased drank of this water in August the city was bound to have discovered and known that it was unwholesome and dangerous? For aught that appears in the case the city may, from time to time, during previous months or years, have examined and tested the waters of these wells. It appears that the department of public health, about the first of June, 1882, ordered the chemist of that department to make an examination of the waters of the wells of the city, and he proceeded with such examination, but did not reach the water of the well in question until the last of August.

Here there was a well in perfect order, clean, free from filth and debris, the water of which had been used with impunity and satisfaction by those living in the neighborhood for many years, and no complaint had been made of it, and no suspicion had been raised that it was in any way unwholesome or dangerous. Under such circumstances, what was there to suggest to the city the duty of analyzing and testing the water prior to the first day of August, 1882? We find nothing.

We have thus far assumed that the city was bound, from time to time, to make a chemical examination of the waters of the public wells for the purpose of ascertaining whether they

Opinion of the Court, per EARL, J.

were pure and wholesome. But we are of opinion that such assumption is not well founded, and that no such burden rests upon the city. The city has its public water-supply by running water in addition to these wells. The wells are furnished and kept for public use by the city. It was undoubtedly the duty of the city to keep the wells and pumps in good order, and to keep the wells properly cleaned out so that they would not become contaminated by anything that might be thrown into them. But these wells were to be supplied by water percolating through the earth; and was the city bound to anticipate that such water would become impure and dangerous in the wells? There was no proof that it was the necessary or even the natural consequence that water in city wells, wherever they may be located, will become poisonous and deleterious. On the contrary, the proof shows that the waters of such wells have been used for years with impunity. These wells were furnished for the accommodation of the public. They were not obliged to use them, and most people have sufficient knowledge to know that their waters may not be as pure as waters brought from pure streams far away from the city limits and from exposure to contamination. The public may use them, and when they are found unwholesome or deleterious, and the city has notice thereof, it is bound to protect the public health by purifying the waters or filling up the wells. The burden upon the city is sufficient if it be held to the responsibility of keeping the wells and pumps in order and clean, and if it be made liable for any injury resulting from the use of impure waters from the wells after it has had notice of their dangerous qualities, and an opportunity to remove the danger. The higher degree of diligence as to water apparently pure and wholesome, agreeable to the taste and in common use by the public without complaint, would be unreasonable.

These views are not in conflict with any of the authorities to which our attention has been called.

In *McCarthy v. City of Syracuse* (46 N. Y. 194), it was held that when the duty was imposed by law upon a public officer

Opinion of the Court, per EARL, J.

or municipal corporation, of keeping a structure in repair, it involves the exercise of a reasonable degree of watchfulness in ascertaining the condition of such structure from time to time; and that where this is omitted such officer or corporation is liable for damages resulting from a dilapidation of the structure, which is an ordinary result of its use, and which would have been disclosed by an examination, and that no notice of the defect is necessary in such a case to fix the liability. There the damage complained of resulted from a defective sewer, and the city was under obligation to use reasonable diligence to keep it in repair, and it could not escape responsibility simply because it had no notice that the sewer was out of repair. Here it was the duty of the city to use reasonable diligence to keep this well and pump in repair, and to guard against any dilapidation or danger resulting from the well. But as we have shown there was no evidence which would justify a finding of culpable negligence as to the well on the part of the city.

In *Hunt v. Mayor, etc.* (109 N. Y. 134), the plaintiff was injured by an explosion of one of the man-holes of a steam heating company in one of the streets of the city of New York. He was defeated in his action for damages. ANDREWS, J., writing the opinion of the court, said: "The language of the cases expressing the measure of duty resting upon a municipal corporation in respect to its streets, sewers, etc., has not always been carefully guarded; but the doctrine has been frequently reiterated in this court that there is no absolute guaranty or undertaking on the part of a municipal corporation, that its streets or other constructions shall, at all times, and under all circumstances, be in a safe and proper condition, and that its obligation and duty extend only to the exercise of reasonable care and vigilance. There must be willful misconduct or culpable neglect to create liability." Here there was no willful misconduct or culpable neglect on the part of the city as to this well. Trees, bridges and other wooden structures will necessarily decay and become unsafe, and where they may thus become dangerous to human life, the duty devolves upon

Opinion of the Court, per EARL, J.

the municipality to make tests and examinations, using reasonable diligence to ascertain whether they are safe or not. (*Vosper v. Mayor, etc.*, 17 J. & S. 296; *Howard v. Legg*, 11 N. E. 614; *Jones v. New Haven*, 34 Conn. 13; *Noristown v. Moyer*, 67 Penn. St. 355.) But this case is not analogous to those. Here there is no proof justifying the inference that the water of this well was constantly and inevitably exposed to impurities which would render it dangerous to human life. On the contrary the evidence shows that up to about the first of August its waters were wholesome and free from dangerous impurities.

This is not like the cases where a city creates or permits a nuisance, or turns a stream of mud or water upon the premises of private individuals. In such cases it is held responsible for the nuisance which it creates or permits, and for its wrongful acts. (*People v. Albany*, 11 Wend. 539; *Nevins v. City of Peoria*, 41 Ill. 502; *Shawneetown v. Mason*, 82 id. 337.)

There was no proof in this case that the city in any way polluted or poisoned the water of this well or permitted others to do so, and hence the cases of *Rex v. Medley* (6 C. & P. 292), *Goldsmid v. Turnbridge Wells I. Co.* (L. R. [1 Eq. Cas.] 161), *Charles v. Hinckley Local Board* (52 L. J. [N. S.] 554), *Brown v. Illius* (27 Conn. 84), *Ballard v. Tomlinson*, L. R. [29 Ch. Div.] 115), are not in point.

Without commenting upon or referring to other authorities found in the interesting and learned brief submitted on behalf of the appellant, it is sufficient to say that we have examined and considered all of them and that we are not able to bring ourselves to the conclusion that there is any principle of law which, upon the facts appearing in this case, imposes any liability upon the defendant for the damages claimed.

The judgment of the General Term should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

119	256
148	623

FIFTH NATIONAL BANK OF PROVIDENCE, RHODE ISLAND,
Appellant, v. NAVASSA PHOSPHATE COMPANY, Respondent.

In an action upon certain promissory notes made payable to defendant, a domestic corporation, and indorsed by L., as its president, it appeared that the defendant had its main office in the city of New York, and while a portion of its business was transacted and most of its purchases and sales were made in other states and countries its principal business operations were carried on in that city, and the annual meetings of its directors were there held. L. was its president and treasurer, the general manager of all its business affairs in said city, and the only officer in attendance at its office there; he paid the current accounts of the company, indorsed checks made payable to its order. The discount of business paper and the use of its money for its purposes, and the account of the same on its cash books were daily and permitted transactions. Defendant had no cash capital, and its working capital was borrowed on the credit of the company; this was done principally by L., and mainly by the use of paper indorsed by him in its name; the evidence tended to show that this was with the knowledge and acquiescence of the directors. *Held*, that the evidence required the submission of the question of the authority of L. to bind defendant by indorsements, to the jury; and that a dismissal of the complaint on trial was error.

(Argued January 17, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 28, 1889, which affirmed a judgment in favor of defendant, entered upon an order dismissing the complaint on trial at circuit.

This was an action upon two promissory notes payable to the defendant, which were indorsed by one Walter E. Lawton, as its president, to the firm of Lawton Brothers, who before their maturity transferred them to plaintiff.

The material facts are stated in the opinion.

Abraham Kling for appellant. It is a settled rule of law that if the indorsement of the notes of a corporation by one of its officers is within the scope of his authority, actual or

Statement of case.

apparent, the corporation is charged with liability without reference to the question of authority in fact. (*Bk. of Attica v. P. & T. Co.*, 1 N. Y. Supp. 483; *Bank v. Aymar*, 3 Hill, 263; *F. & M. Bank v. Bank*, 16 N. Y. 125; *Bank v. Bank*, 14 id. 623; *Cooke v. Bank*, 52 id. 96; *Bank v. N. Y., L. E. & W. R. R. Co.*, 106 id. 195; *Olcott v. T. R. R. Co.*, 27 id. 560; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 id. 30; *Bank v. Clements*, 6 Bosw. 166; 31 N. Y. 33.) It was error for the court to hold that the plaintiff could not recover as it failed to prove it had knowledge of the apparent authority of Lawton to make the indorsement on the notes in suit when it purchased the same. (*Bank v. Clements*, 31 N. Y. 33; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 id. 30; *Bank v. N. Y., L. E. & W. R. R. Co.*, 106 N. Y. 195; *Holden v. Bank*, 72 id. 286; 4 Paige, 127.) The defendant cannot set up its by-laws, never published to the world and disregarded by itself, as controverting the authority conferred upon Lawton to indorse these notes. (*Marine Bk. v. Butler*, 5 N. Y. Supp. 291; *Martin v. Niagara*, 44 Hun, 131, 132; *Martin v. Webb*, 110 U. S. 7.) The Delta Azotin Company passed a good title to the note in suit. (Code Civ. Pro. § 1776; *Conn. Bk. v. Smith*, 9 Abb. 168; *Loaners' Bk. v. Jacoby*, 10 Hun, 143; *East River Bk. v. Rogers*, 7 Bosw. 493; Laws of 1860, chap. 269; *Pusey v. N. J. R. R. Co.*, 14 Abb. [N. S.] 441; *Com. Bk. v. Pfeiffer*, 108 N. Y. 242.)

Eugene L. Richards for respondent. Plaintiff failed to show itself a *bona fide* holder, because it failed to prove that it had knowledge of the apparent authority of Lawton to make the indorsements in suit. (*S. N. Bk. v. P., etc., Mfg. Co.*, 18 N. Y. S. R. 954; *Dabney v. Stevens*, 40 How. Pr. 341; 46 N. Y. 681; *Queen v. S. A. R. R. Co.*, 3 J. & S. 154; *De Bost v. P. Co.*, 35 Hun, 386-388; *Risley v. I. B. & W. R. R. Co.*, 1 id. 204, 205; *Fawcett v. N. H. O. Co.*, 47 Conn. 228; *F. N. Bk. v. O. Bank*, 60 N. Y. 278; Taylor on Corp. §§ 200, 205, 206; *Nat. Bk. v. Globe Works*, 101 Mass. 57; *Maas v. M. K. & T. R. Co.*, 83 N. Y. 233.) The alleged

Opinion of the Court, per FINCH, J.

previous indorsements by Lawton were not proven to be similar to the ones in suit, and were not, therefore, proof of any implied authority upon which plaintiff can recover. (*Dabney v. Stevens*, 40 How. Pr. 345, 347, 351; *P. Bank v. S. A. Church*, 109 N. Y. 512, 525; *Knight v. Lamb*, 4 E. D. Smith, 381, 382.) The alleged previous indorsements by Lawton were not proven to have been ratified by or even known to defendant, and are, therefore, no basis of any implied authority. (*P. Bank v. S. A. Church*, 109 N. Y. 512, 525; *Dabney v. Stevens*, 40 How. Pr. 341; *Blen v. Bear River Co.*, 20 Cal. 602; *Cumberland Co. v. Sherman*, 20 Md. 117; *Lawrence v. Gebhard*, 41 Barb. 575; *Whitewell v. Warner*, 20 Vt. 425; *Fawcett v. Organ Co.*, 47 Conn. 228; *Knight v. Lamb*, 4 E. D. Smith, 381, 382.) The mere proof of Lawton's hand-writing and official connection with defendant was not of itself proof either of express or implied authority, and the complaint was properly dismissed. (*P. Bank v. S. A. Church*, 209 N. Y. 512; *Adriance v. Roome*, 52 Barb. 399; *Dabney v. Stevens*, 40 How. Pr. 341; 46 N. Y. 681; *Marine Bank v. Clements*, 3 Bosw. 600; *Risley v. Railroad Co.*, 1 Hun, 204; *Queen v. S. A. R. R. Co.*, 3 J. & S. 154; *Jackson v. Campbell*, 5 Wend. 572; *Titus v. C., etc., R. R. Co.*, 37 N. J. L. 98, 102; *Fulton Bk. v. Canal Co.*, 4 Paige, 127, 134; *Blen v. B. R. Co.*, 20 Cal. 602; *Benedict v. Lansing*, 5 Denio, 283; *Central Bk. v. Empire Co.*, 26 Barb. 33; *Lawrence v. Gebhard*, 41 id. 575; Taylor on Corp. § 193; *Whitewell v. Warner*, 20 Vt. 425.) This is not a case of secret instructions to an agent. (*Rathbun v. Snow*, 22 N. Y. S. R. 227; *Westervelt v. Radde*, 7 Daly, 326.)

FINCH, J. We think the question of the authority of Lawton to bind the defendant company by indorsement was one of fact which should have been submitted to the jury, and that the trial court erred in deciding it as a question of law. In other words our conclusion is that the record contains some evidence of the existence of such authority, and enough to require the judgment of a jury upon it.

Opinion of the Court, per FINCH, J.

Lawton was president and treasurer of the Phosphate Company and the general manager of all its business affairs in the city of New York. While it had an office in Baltimore, yet at the one in New York the buying and selling of phosphates, the shipment and the discharge of cargoes, the annual meetings of the directors, the record of transfers of stock, the discount of business paper, the use of the money of the corporation for its purposes, and the account of the same in its cash-book were daily and permitted transactions. This concentration of business at the New York office seems not to have been accidental or unanticipated, for the articles of association show that the company was incorporated under the laws of this state and that the principal part of the business was to be transacted in the city of New York while a "part of the business" was to be done in the island of Navassa in the Carribbean sea and also in the states of Massachusetts, Maryland, New Jersey and Pennsylvania. At this principal business office in New York the only official of the company in attendance and conducting its affairs was Lawton, the president. One other director only was a resident of this state, but the whole burden and responsibility was thrown upon and borne by the president at the office in New York. The evidence shows that he chartered vessels for the shipment of phosphates from the island, that he attended to the insurance of the cargoes, that he paid the current accounts of the company, and indorsed checks which were payable to the company's order. He was not only president but treasurer, and was consciously invested by the company with the broad general power inseparable from the position in which it placed him as the sole manager of its affairs at its principal place of business. It is true that the sales of phosphates actually delivered in New York were small in comparison with the bulk of the company's business, but they sold to some extent on foreign account, the shipments for which were direct from the island, the financial management appearing upon the books in New York, and it does not follow from the proof that the great bulk of the business was not done in that city and by the president.

Opinion of the Court, per FINCH, J.

The company had no cash capital. Its articles of association disclose that fact and that all its shares issued were to be issued for property purchased. Its annual reports show the same thing. Where then was the money to come from with which to pay for the loading and shipment of the phosphates, the labor employed in the work, the premiums for insurances and the charter of vessels? At least until profits were realized and a surplus accumulated over and above dividends paid, the working capital was necessarily to be borrowed upon the credit of the company. No director was ignorant of that fact. Who, then, was authorized to do the borrowing? The evidence shows that it was done mainly in New York and by Lawton as president. For eight or nine years he was continually indorsing paper as agent of the company, procuring discounts, putting the proceeds to the credit of the company in its deposit accounts, and using those proceeds as far at least as necessary in its business. Were the directors of the company ignorant of that fact? There is no proof that they ever borrowed a dollar to put or keep the enterprise in motion, except in one instance to which I shall refer, and must have known that Lawton borrowed or furnished the necessary means. Two discounts at least which went to the benefit of the company were pointed out upon its cash-book, kept in New York, and all of them were said to appear upon the stubs of the check-book. At the annual meeting held in New York each year Lawton made a report to the directors and laid the books before them. They looked them over, not critically, perhaps, but to some extent, and spread upon them was the truth of what Lawton was doing, and they "took his word for everything."

But an occasion came when direct information was given, unless a very improbable presumption furnishes an answer. The witness, Kirkland, who was employed in Lawton's office, went to Baltimore with notes drawn by Lawton Bros. for \$20,000. He there met Dunan, who was secretary and commercial agent of the company, and John C. Grafflin, who was vice-president and a director. Neither of these persons had

Opinion of the Court, per FINCH, J.

any authority conferred by the by laws to indorse the paper of the company, or bind it in any manner. And yet upon the representation of Kirkland that a stringent money market in New York made it impossible for Lawton to procure money there and that he needed it promptly, Dunan indorsed the notes in the name of the company and Grafflin procured their discount and the proceeds were remitted to Lawton. It is difficult to believe that Grafflin and Dunan were lending the credit of the company to Lawton as an individual and to enable him to meet his personal obligations. That implies an utter violation of duty on their part and so gross as to be improbable, though not impossible. It is a more reasonable supposition that they knew the paper which Lawton desired to meet was that upon which the Navassa Company had been made liable by his indorsement, and so that they had some justification for the indorsement and discount which they made and procured. The plaintiff offered to prove that such indorsement was for the benefit of Lawton as treasurer, but the question was excluded.

While the by-laws of the Navassa Company place a restriction upon the action of its treasurer, they impose none upon that of the president, and it was competent for the company to authorize him to bind it by indorsement. That he undertook to do so upon large amounts of paper, and continued the practice for eight or nine years; that by that process he furnished the working capital of the company so far as it appears to have had any; that annually he put the books and accounts before the directors, and that some of them were present when the indorsements were made, are facts which were proved on the part of the plaintiff. The real difficulty which beset it, and which produced its defeat in the courts below was in establishing that the directors knew that he was creating obligations against the company, and gave him authority by acquiescing in its exercise. But the circumstantial evidence, although by no means conclusive, tends to establish that knowledge. The directors knew that the business of the company was being carried on at New York by Lawton; that in

Opinion of the Court, per FINCH, J.

the absence of cash capital it must have been done with borrowed money; and, therefore, that Lawton was creating obligations against the company which it would be called upon to reimburse. They knew, too, that no one of them had given a written consent to him as treasurer to create obligations, and so they must have understood that to a greater or less extent he was borrowing money on the credit of the company, either acting as treasurer without the written assent or acting as president without a specific authority expressly conferred. To either process they assented by silent acquiescence, and while ignorant of details, it may well be urged that they were not ignorant of the material and fundamental fact. And this element of the situation is so far supplemented by the facts that the cash-books and check-books were put before them at the annual meeting; that one of the directors did each year examine the check-book of the Chemical Bank, which showed large discounts; that some of the paper was indorsed by Lawton in the presence of the directors, as to raise a serious question of fact. It is true that some of this proof was contradicted, and much of it in some directions justly criticized, but that does not help us to disregard it entirely. If such authority was conferred, it will protect the plaintiff bank on that ground, and without proof on its part that its officers knew in advance of the exercise of such authority and its ratification. As to the plaintiff it becomes an actual authority. The question, therefore, must be submitted to a jury, and when that is done nothing which we have said about the facts in the performance of our duty must prejudice or control their performance of their own.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

JOHN OUDERKIRK, Respondent, v. THE CENTRAL NATIONAL
BANK OF TROY, Appellant.

119	263
119	634
119	263
123	65
119	263
141	106

A bailee, whatever the character of the bailment may be, is, when its purpose is fully satisfied, bound, upon request, to re-deliver the thing bailed to its lawful owner.

To justify a refusal to return the property, on the ground of a loss thereof, the burden is upon the bailee of showing the exercise by him of due care according to the nature of the bailment.

It seems, such re-delivery may be excused in the case of a bailment mutually beneficial to the parties, by proof that the deposit has been lost or destroyed without negligence or want of such care on the part of a bailee as prudent men under similar circumstances commonly take of their own goods.

It seems, also, that in the case of gratuitous bailments the bailee is only chargeable with gross neglect.

In an action to recover for the conversion of certain bonds, it appeared that plaintiff, a regular customer of defendant, deposited the bonds with it as collateral security for discounts. Discounts and renewals upon the security of such bonds were obtained by plaintiff, from time to time, during a period of four years. When the last note so discounted was paid, defendant's cashier, at his own suggestion, delivered to plaintiff a receipt signed by him as cashier, acknowledging the receipt of the bonds as collateral and stating that all loans having been paid, the bonds were retained for future like use or safe keeping, subject to plaintiff's order. Defendant thereafter, as it had done before, paid the coupons falling due on the bonds to plaintiff until October, 1887. In February, 1888, plaintiff demanded a return of the bonds but was informed that they could not be found; no information was afforded him in respect to the circumstances attending their disappearance or the mode by which they had been removed, if at all, from the possession of the bank. Upon the trial defendant gave evidence tending to show that it was its custom to return securities, held as collateral, to the owner upon payment of loans; that while held they were kept with other valuable securities belonging to defendant in a steel box inclosed in an iron safe; that the safe and box had combination locks, the combination on the box being known to defendant's president and cashier alone and the latter alone having the key. It was also proved that the cashier had been in defendant's employ for many years and had borne a good reputation until December, 1887, when he was removed for the alleged reason that he was a defaulter. All of defendant's officers, except said cashier, testified that they had no knowledge of its possession of the bonds or of the place where they were kept after the loans were paid, and that they, respectively, had not abstracted them. Defendant's by-laws provided for the appointment by its presi-

Statement of case.

dent, once at least in every three months, of a committee, consisting of two members of the board, who with the president and cashier should constitute a committee of examination, and they were required to examine all matters "pertaining to the affairs of the institution" and report the same. Examinations were only made once in six months by three examiners and were confined to the securities owned by defendant and those it held as collateral for unpaid loans. The reports showed no account of such collaterals or of special deposits. Defendant was accustomed to receive special deposits from its customers for safe keeping, which were usually kept in the vault, but were not entered upon its books, and no subsequent examination, inspection or report in relation thereto was ever made or provided for. No other evidence was given as to the disappearance of the bonds. Defendant's cashier was not called as a witness. *Held*, that defendant was not a gratuitous bailee, but the bailment was one for mutual benefit, and it was liable, at least, for failure to exercise ordinary and reasonable care and diligence in the custody of the bonds; that it was within the authority of the cashier to make the agreement on its part to continue as custodian of the bonds, for the purposes for which they had theretofore been used, and the fact that all the loans were paid did not change the character of its liability; that the evidence failed to show the exercise on its part of the requisite degree of care and justified a submission of the case to the jury and a verdict for plaintiff.

Reported below, 52 Hun, 1.

(Argued January 16, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made March 16, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This action was brought to recover for the alleged conversion of certain United States bonds.

The facts so far as material are sufficiently stated in the opinion.

Orin Gambell for appellant. The cashier of a bank has no power to bind the bank by a contract to receive securities on deposit unless he is authorized so to do by the direction of the managers of the bank, or unless such authority may be implied from the ordinary course of business of said bank. (*F. N. Bk. v. O. N. Bk.*, 60 N. Y. 279, 291; *United States v. City Bk.*, 21 How. [U. S.] 356; *Fleckner v. Bank*, 8 Wheat. 457; *U. S. Bk. v. Dunn*, 6 Pet. 51; *Dabney v.*

Statement of case.

Stevens, 10 Abb. Pr. [N. S.] 39; *Adriance v. Roome*, 52 Barb. 399; Morse on Banks and Banking, 156, 157; *Morse v. M. N. Bk.*, 1 Holmes C. C. Rep. 209; *Elwell v. Dodge*, 33 Barb. 336; *State Bk. v. Perkins*, 4 Bosw. 420; *C. N. Bk. v. Koner*, 8 Daly, 530.) A national bank has power to agree to receive, as gratuitous bailee, securities to be deposited in its vaults for safe keeping, and is liable to the depositor thereof for such securities which are lost through its gross negligence. (*Pattison v. S. N. Bk.* 80 N. Y. 82; 17 Hun, 419; *Foster v. Essex Bk.*, 17 Mass. 478; *Scott v. Bank*, 72 Penn. St. 478; *L. C. N. Bk. v. Smith*, 52 id. 47; *F. N. Bk. v. Graham*, 79 id. 106; *Turner v. F. N. Bk.*, 26 Ia. 562; *Smith v. F. N. Bk.*, 69 Mass. 605; *C. N. Bk. v. Schley*, 51 Ga. 369.) The defendant having been from January 26, 1887, a gratuitous bailee of these bonds, it can be made liable only for gross negligence. (*Scott v. N. Bk.*, 72 Penn. St. 478.) If the court shall be of opinion that the Central National Bank was not merely a gratuitous bailee of these bonds after the 26th day of January, 1887, then in that case the rule of diligence required of the bank as laid down by the court in the charge to the jury is erroneous and demands a greater degree of diligence upon the part of the bank than can be sanctioned by law. (Edwards on Bailments 6, 7, §§ 234, 235; *Erie Bk. v. S. R. & Co.*, 3 Brewster, 9; *St. Losky v. Davidson*, 6 Cal. 643; *Jenkins v. N. V. Bk.*, 58 Me. 275; *Schmidt v. Blood*, 9 Wend. 268.) The bank is not liable unless it can be shown that Mr. Wickes had been an incompetent person and that the bank was careless in keeping him in his position, knowing that he was incompetent either for want of capacity or for want of moral character. (*Scott v. N. Bk.*, 72 Penn. St. 479; 1 Blackst. Comm. 429; *M. Bk. v. Bk. of Columbia*, 5 Wheat. 326.) There is an obligation upon the plaintiff to prove in some way lack of ordinary care; and if he does not prove it, then he has not made out his case. (*Fleming v. N. N. Bank*, 62 How. Pr. 179.)

J. M. Landon for respondent. The bank had power to receive the bonds, either as collateral security or as a special

Opinion of the Court, per RUGER, Ch. J.

deposit for safe keeping. (*Pattison v. S. N. Bank*, 80 N. Y. 82.) The bank cannot successfully claim that the bonds were left with the cashier as an individual and not with the bank, and that the cashier had no authority to make the agreement for the bank. (*Caldwell v. M. Bank*, 64 Barb. 333-340; Story on Agency, § 114; *Griswold v. Haven*, 25 N. Y. 595; *Van Leuren v. F. N. Bank*, 54 id. 671; *Pattison v. N. Bank*, 80 id. 82; *T. N. Bank v. Boyd*, 22 Am. Rep. 35.) The bonds having been left with the bank as collateral security for the payment of a note, and after the payment of the note not delivered to the plaintiff upon demand, is *prima facie* evidence of conversion, and the bank cannot excuse itself without showing affirmatively what had become of them, or some good ground for not returning them; the burden of exculpation is upon the bank. (*Caldwell v. N. M. V. Bank*, 64 Barb. 346; *Pattison v. S. N. Bank*, 80 N. Y. 98; Schouler on Bailments, § 23; *Collins v. Bennett*, 46 N. Y. 490; *F. N. Bank v. Zent*, 39 Ohio St. 105; *Cutting v. Malor*, 78 N. Y. 454; *L. C. N. Bank v. Smith*, 62 Penn. 47; Story on Bailments, § 339.) The defendant did not exercise even ordinary care in keeping the bonds. (*Caldwell v. M. Bank*, 64 Barb. 333.)

RUGER, Ch. J. Many of the questions involved in this case are authoritatively decided in the case of *Pattison v. Syracuse National Bank* (80 N. Y. 82). It is there held that national as well as state banks have authority to receive bonds and other securities, gratuitously and otherwise, for safe keeping and general banking purposes, from third persons, as a customary and usual incident of the business of banking, and that where the proof shows that the cashier has been accustomed, with the knowledge of the directors of the bank, to receive such deposits, it is a question of fact for the jury to determine whether he did so on behalf of the bank or as an individual. It is also plainly inferable from that case, that private instructions given to the cashier by other officers of the bank in relation to deposits, which are not communi-

Opinion of the Court, per RUGER, Ch. J.

cated to depositors, do not constitute any limitation upon the liability of the bank in case a loss occurs. (See, also, *Caldwell v. N. M. V. Bk.* 64 Barb. 333.) It was further held therein that a bank is chargeable for the loss of securities, gratuitously kept, for gross negligence alone, and that, having lawfully received securities on deposit, it was bound either to return them when called for, or show some sufficient ground for not doing so.

It is obvious that a bailee, whatever the character of the bailment may be, when its purpose has been fully satisfied and performed, is bound, upon request, to re-deliver the thing bailed to its lawful owner. This is necessarily implied, in all cases, from the nature of the contract of bailment. The authorities are uniform to the effect that such re-delivery may be excused in the case of a bailment, mutually beneficial to the parties, by proof that the deposit has been lost or destroyed without negligence, or want of such care on the part of a bailee as prudent men, under similiar circumstances, commonly take of their own goods. In the case of gratuitous bailments however, the bailee is liable only when chargeable with gross neglect. (Edwards on Law of Bailment, p. 7, *et seq*; Jones on Bailments, 23.)

It necessarily follows, from the nature of the obligation and the refusal to return the property, that the burden of showing the circumstances of the loss rests upon the bailee, and, unless the evidence shows the exercise of due care by him according to the nature of the bailment, he will be held responsible for the breach of his contract to return the property bailed. (*Patterson v. Syracuse Natl. Bk.*, *supra*; *Caldwell v. Mohawk Bk.* *supra*; *Collins v. Bennett*, 46 N. Y. 490; *Cutting v. Mahlor*, 78 N. Y. 454; *Russell Mfg. Co. v. N. H. Steamboat Co.*, 50 N. Y. 121)

The sufficiency of the evidence to establish the exercise of proper care will, generally, be a question of fact for the jury to determine upon all of the circumstances of the case, and the question here presented is, whether, under the circumstances proved, the jury was warranted in finding that the defendant

Opinion of the Court, per RUGER, Ch. J.

was negligent in exercising the degree of care required for the safe keeping of the bonds in question. The proof showed that the plaintiff was a merchant residing at Troy and a regular customer of the bank and in March, 1883, left his bonds with the bank as collateral security for discounts made, and to be made, for him by such bank upon notes signed by him alone, and that they were never returned or offered to be returned to him by the bank. Discounts and renewals upon the security of such bonds were obtained by the plaintiff from time to time, extending over a period of nearly four years, when the last discounted note held by the bank was paid by an agent of the plaintiff. Upon that occasion the cashier voluntarily delivered to the agent a receipt signed by him, as cashier, acknowledging that the bonds had been received by the bank as collateral security for discounts made by it to plaintiff and that all such loans having been paid, the bonds were retained for future like use or safe keeping, subject to the plaintiff's order. Thereafter, as theretofore, the bank continued to pay the coupons falling due on the bonds to the plaintiff until October, 1887. In February, 1888, the plaintiff demanded the return of the bonds and was informed that they could not be found; but no information was afforded him in respect to the circumstances attending their disappearance or the mode by which they had been removed, if at all, from the possession of the bank.

Upon the trial the defendant gave evidence tending to show that it was the custom of the bank to return securities, held as collateral, to the owner upon payment of loans; but that while they were so held they were kept, with other valuable securities belonging to the bank, in a steel box inclosed in an iron safe, which was inclosed in a vault. The iron safe, as well as the steel box, had combination locks and the combination upon the steel box was known to the president and cashier alone, and the cashier alone had a key thereto. There was evidence also given to the effect that the cashier had been in the employ of the bank for many years and was a man of good reputation, until December, 1887, when he was removed from his position

Opinion of the Court, per RUGER, Ch. J.

for the alleged reason that he was a defaulter. Neither the circumstances nor the character of the defalcation was shown. All the bank officers, except the cashier, testified that they had no knowledge of the possession by the bank of the bonds in question or the place where they were kept after the loans were paid, and that they, respectively, had not abstracted them from the bank.

The by-laws of the bank provided for the appointment by its president, once at least in every three months, of a committee consisting of two members of the board, who, together with the president and cashier, should constitute a committee of examination, and who were required to examine all matters "pertaining to the affairs of the institution" and report the same to the board. In actual practice, examinations were made only once in six months instead of three, and by three examiners instead of two. The examinations were, in fact, confined to the securities owned by the bank, and such as it held as collateral for unpaid loans; but the reports showed no account of such collaterals or of special deposits. The bank was accustomed to receive special deposits for safe keeping from its customers, which were usually kept in the vault, but no entry thereof was made on the books of the bank, and no subsequent examination, inspection or report in relation thereto was ever made, or provided for through the by-laws, except as hereinbefore stated. Examinations of the affairs of the bank were also annually made by a government inspector, but they related only to the loans, discounts, revenues and property of the bank, and did not include an inspection of its special deposits or unreturned collaterals. No evidence was given tending to show the cause of the abstraction or disappearance of the plaintiff's bonds, except that inferable from the circumstances above enumerated.

We are of opinion that the bank, under the circumstances of this case, was not a gratuitous bailee of the bonds, and was, in any view, liable for the want of ordinary and reasonable care and diligence in their custody. The bonds came into its hands in the usual course of business as collateral security

Opinion of the Court, per RUGER, Ch. J.

for loans to a customer, and it had never relieved itself of the liability thereby incurred by returning, or offering to return, them to their owner. On the contrary, it agreed, through its proper financial agent, to continue as their custodian for the purposes for which they had theretofore been employed. The making of such a contract was clearly within the power of the officer charged with the duty of negotiating loans and discounts, as one of the necessary incidents of the business he was employed to perform. The extension of lines of discount and credit to persons engaged in business upon stipulated securities, is one of the most common features of banking, and it must often happen that such loans are from time to time wholly or partially paid and satisfied. But we think this fact would not change the character of the liability of the bank in respect to the safe keeping of such securities. Intervals of days, weeks and months may frequently elapse between discounts, and it would be quite absurd to hold that during these periods the bank occupied any other relation to its customer than that of custodian of his bonds for purposes deemed mutually beneficial to both parties. The arrangement contemplated a course of business which was to continue for an indefinite period, and the notion that the bank was responsible for the safe keeping of the customer's securities so long only as particular loans were running, is founded upon too narrow a view of the obligation of the bank. The contract, under which the bank held the bonds, extended from the time of their reception until they were finally returned to the depositor, and its liability remained unchanged so long as the contract was in force. This contract enured to the mutual benefit of the parties, as it afforded the depositor ready facilities for raising money, and to the bank the profits of the business, the retention of its customer, and adequate security from loss in the transaction of its business.

Having arrived at the conclusion that the bank was not a gratuitous bailee, but received a compensation for the bailment, it follows that it was chargeable with the exercise of a high degree of care in their keeping.

Opinion of the Court, per RUGER, Ch. J.

It is not important in this case to consider with critical accuracy the difference between the various degrees of care required as to the several kinds of bailments, inasmuch as the evidence authorized the jury to find that the defendant omitted the exercise, not only of a high degree of care, but also of that denominated ordinary or reasonable care. The test of what is regarded as gross negligence or a want of the highest degree of care, by a bailee, as stated in the case of *Foster v. Essex Bank* (17 Mass. 499), a leading case in this country upon the doctrine of the non-liability of banks to special depositors, is "that degree of care which is necessary to avoid the imputation of bad faith, is measured by the carefulness which the depositary uses towards his own property of a similar kind." Ordinary neglect is said in the same case to be, according to Sir William Jones, "such as would not be suffered by men of common prudence or discretion."

While it is held in this state that the fact that the bailee's property is also stolen at the same time as that of the bailor, does not furnish conclusive evidence of the exercise of ordinary care (*Patterson v. Syracuse Bank*), yet it is the uniform doctrine of the cases that evidence of a want of such care as the bailee generally bestows upon his own property is strong and persuasive evidence of negligence on his part with respect to the property bailed. We have been unable to discover in the evidence before us proof of the exercise of reasonable care by the bailee in the custody and keeping of the bonds after the loans were discharged. Wherever they might have been kept while the loans were pending, or whoever might then have been charged with their custody, after that time, no effort or precaution seems to have been adopted by the bank to identify and protect the property from misappropriation by its officers and clerks. So far as appears, any or all of the employes of the bank could at any time have abstracted what the bank termed special deposits, and would have been practically safe from discovery or detection, except by accident or chance, for an indefinite period of time. A course of business affording such opportunities to fallible guardians, presents

Opinion of the Court, per RUGER, Ch. J.

an irresistible temptation to use the property under their control for illegal purposes, and usually results in the loss of the securities thus exposed. (*First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278.) While the bank protected its own property from loss or embezzlement through its employes by entries in its books as to its amount and character, and by frequent examinations ascertained its safety and condition, no such precautions were taken with reference to the property of customers left in its possession. No precaution whatever, either by keeping a record of such securities and thus facilitating the tracing and recovery of them in case of loss, or examinations, inspections or inquiry in relation thereto, were resorted to or provided for by the defendant, but they were left exposed wholly to the self-restraint and unguarded control of those having opportunity to take them. (*Caldwell v. Mohawk Nat. Bank*, *supra*.)

The claim that immediately upon the payment of the loans, for whose security the bonds were held, the bank could abandon their possession to the officer receiving payment thereof without incurring liability to their owner, is too fallacious to need serious refutation. We think the case fails to show the exercise of reasonable care by the bank in the keeping of these bonds. A board of directors which leaves the custody, control and management of its securities and property to a single officer, no matter how high may be his character and reputation, for a long space of time without supervision, examination or inquiry, is justly subject to the charge of negligence in the performance of its duty. It is said in *Morse on Banking* (p. 77), as to the duty of directors of banks, that they "are bound to constant activity and thorough acquaintance with the daily course of the affairs and dealings of the institution. It is their duty to make this acquaintance so thorough that no officer can continue long and consistently to usurp a function of any degree of importance whatever without their knowledge." It is further said on page eighty-four, in relation to the duty of a board of directors in supervising the conduct of the officers of a bank, that if such officers had borne bad character, or had circumstances of sus-

Opinion of the Court, per RUGER, Ch. J.

picion or demanding inquiry come to the knowledge of the board, or had the board for any reason been unwilling to trust their own property with them in the same manner in which they trusted the property of the bank, a case might have been made for holding the bank liable for a loss occurring to a special depositor.

It was said by the late Chief Judge CHURCH in *Cutting v. Mahlor* (78 N. Y. 460), that "a corporation is represented by its trustees and managers; their acts are its acts, and their neglect its neglect. The employment of agents of good character does not discharge their whole duty. It is misconduct not to do this, but in addition they are required to exercise such supervision and vigilance as a discreet person would exercise over his own affairs. The bank might not be liable for a single act of fraud or crime on the part of an officer or agent, while it would be for a continuous course of fraudulent practice. * * * Here were no supervision, no meetings, no examination, no inquiry. * * * A system of management of a banking-house, in which such conduct of its officers was permitted, was a breach of duty and grossly negligent towards its dealers, and persons having stocks and bonds in its keeping."

This language is peculiarly applicable to this case and correctly states the rule by which the evidence for the defense should be considered. That evidence utterly fails to show the exercise of that degree of care which it bestowed upon its own property, or the circumstances attending the loss of the bonds, from which such care might be inferred, and fully supports the verdict of the jury. The defaulting cashier was not called to explain their disappearance or to state whether he took them or not, and no explanation was given why he was not so called. He was the agent whom the bank had employed as the custodian of its funds and represented it in its transactions with the public and, in the absence of other sufficient evidence of their loss, we think it was the duty of the bank, if it was able to do so, to produce this witness for examination on the trial, and, in the absence of such testi-

Statement of case.

mony, the jury might well have found that the defendant had not sufficiently shown that the bonds were lost without neglect on its part. The evidence was insufficient to establish as a proposition of law that the cashier had stolen the bonds or that they were appropriated by him, and it was a possible explanation or solution of their non-delivery, that they had been inadvertently mislaid or delivered to another depositor by some officer of the bank or were used by the cashier in the business of the bank, or appropriated by the defaulting cashier after his misconduct had been discovered.

We think the charge of the court was not justly subject to criticism in respect to remarks made relative to the degree of care required of the bank to relieve itself from liability to the plaintiffs.

Under the principles governing the case hereinbefore laid down, the bank was liable for an omission to exercise ordinary and reasonable care in protecting the property of its customers, and such care, we think, excludes the commission of any act of negligence by the bailee.

In pursuance of these views the judgments of the courts below should be affirmed.

All concur, GRAY, J., in result.

Judgment affirmed.

119	274
122	302
119	274
136	151

LUCY F. WYMAN, as Administratrix, etc., Respondent, v. THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, OF HARTFORD, CONNECTICUT, Appellant.

In an action upon a policy of insurance on the life of W., non-payment of premium, due October 25, 1884, was pleaded as a defense. The policy contained a clause declaring that the agents of the company "have no power to waive or postpone payment of premium, or to accept payment after it becomes due." It appeared that on July 1, 1884, W. wrote to defendant as to how large a paid-up policy it would give him. Defendant answered stating the then present value of the policy, and what it would be in October, adding that G., its general agent, "will give you further information, or you can write here." The day the premium

Statement of case.

became due a son of W. called on G. and told him his father had concluded to take a paid-up policy, and then, supposing that a payment of the premium was a necessary step, offered to G. the amount in cash. G. said that payment of the premium was not necessary to entitle W. to a paid-up policy, but advised the continuance of the existing policy, and suggested the witness should talk the matter over with his father and let him decide, adding that he could come in and pay the premium at any time within a week or ten days. On November 3d, G., describing himself as "manager" and his office as a "branch office," acknowledged the receipt of the policy in question "to be replaced by paid-up policy in such amount as has been agreed upon," and added: "Time extended thirty days in which to reach a decision with regard to taking paid-up policy." It also appeared that G. had many times accepted premiums from the assured, after their maturity, under circumstances which fairly charged defendant with knowledge of the fact, and made their acceptance of the money a ratification of waiver by the agent. W. died November 8th, and two days later his son paid to G. the premium, receiving a receipt therefor. The trial court directed a verdict for defendant. *Held*, error; that the assured was authorized in assuming that G. had authority to continue and carry out the negotiation for an exchange of policies as broad and effective as that of the home office, and had special authority so far as this policy was concerned to waive prompt payment; that the default was occasioned by the acts of such agent; and that it could not be said as matter of law that there was no waiver.

(Argued January 15, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made July 9, 1889, which reversed a judgment in favor of defendant entered upon a verdict directed by the court, and reversed an order denying a motion for a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

Thomas Thacher for appellant. Plaintiff failed to prove a cause of action. (Code, § 533; *Wyman v. P. M. Ins. Co.*, 45 Hun, 184; *Roehner v. K. L. Ins. Co.*, 63 N. Y. 164; *Wheeler v. C. M. L. Ins. Co.*, 82 id. 543; *Howell v. K. L. Ins. Co.*, 44 id. 281; *Bogardus v. N. Y. L. Ins. Co.*, 101 id. 328, 334, 335; *Attorney-General v. C. L. Ins. Co.*, 93 id. 73; *Sidenberg v. Ely*, 90 id. 266; *Simpson v. French*, 25 How. Pr. 464; *Robertson v. M. Ins. Co.*, 88 N. Y. 541; *Marvin v.*

Statement of case.

Ins. Co., 16 Hun, 494; *Ripley v. Ins. Co.*, 30 N. Y. 136; *Underwood v. Ins. Co.*, 57 id. 500; *Marvin v. U. T. Ins. Co.*, 80 id. 282; 85 id. 278; *Ins. Co. v. Wilkinson*, 13 Wall. 222; *Mersebau v. P. M. L. Ins. Co.*, 66 N. Y. 249; *Brown v. M., etc., Ins. Co.*, 13 Ins. L. J. 208; *Davis v. M., etc., Ins. Co.*, 13 Blatch. 462; *Walsh v. H. Ins. Co.*, 73 N. Y. 5; *Robertson v. M. Ins. Co.*, 88 id. 541; *Bennecke v. C. M. Ins. Co.*, 105 U. S. 355; *Lomer v. Meeker*, 25 N. Y. 361.) There was no error in the exclusion of testimony. (1 Greenl. on Ev. §§ 113, 114; *Anderson v. R. R. Co.*, 54 N. Y. 334; Code, § 844; Laws of 1845, chap. 195; Laws of 1867, chap. 557; *Bowen v. Stillwell*, 9 Civ. Pro. Rep. 277; *Williams v. Waddell*, 5 id. 193; *Hobart v. Hobart*, 62 N. Y. 83; *Wilson v. Munoz*, 6 Civ. Pro. 73; *Severn v. Nat. Bank*, 18 Hun, 228; *Lobdell v. Lobdell*, 36 N. Y. 327; *Nearpass v. Gilman*, 16 Hun, 121; *Dwight v. Ins. Co.*, 102 N. Y. 341; *Davis v. Gwynne*, 57 id. 676; *White v. Hoyt*, 73 id. 512; *Underhill v. Vandervoort*, 56 id. 242.)

Samuel Greenbaum for respondent. The non-payment of the October premium was waived by the defendant. (*Palmer v. P. M. L. Ins. Co.*, 84 N. Y. 63; *Dean v. A. L. Ins. Co.*, 62 id. 642; *Bodine v. E. F. Ins. Co.*, 51 id. 117; *Titus v. G. F. Co.*, 81 id. 419; *Robertson v. M. L. Ins. Co.*, 93 id. 544.) A waiver need not be based upon a new consideration in order to be binding. (*Prentice v. K. L. Ins. Co.*, 77 N. Y. 483; *Goodwin v. M. L. Ins. Co.*, 73 id. 480; *Burk v. H. Ins. Co.*, 80 id. 108-112; *Titus v. G. F. Ins. Co.*, 81 id. 410-419.) The defendant is estopped from asserting that the general agent had no authority to accept premiums after premium days. (*Attorney-General v. C. L. Ins. Co.*, 33 Hun, 138; *Whitehead v. N. Y. L. Ins. Co.*, 102 N. Y. 156; *Meyer v. K. L. Ins. Co.*, 73 id. 516.) It is a question of fact to be submitted to the jury as to whether the general agent had authority to execute the memorandum, and as to what the intention of that exhibit was under all the circumstances. (*Stillwell v. Carpenter*, 2 Abb. [N. C.] 238; *Nicholson v. Connor*, 8 Daly,

Opinion of the Court, per FINCH, J.

22; *Elwood v. W. U. T. Co.*, 45 N. Y. 553; *Kavanagh v. Wilson*, 70 id. 177; *Gildersleeve v. Landon*, 73 id. 609; *Wohlfahrt v. Beckert*, 92 id. 490.) The defendant failed to comply with the Laws of 1877, chapter 321. (*Phelan v. N. M. L. Ins. Co.*, 113 N. Y. 147; *Carter v. B. L. Ins. Co.*, 110 d. 15.)

FINCH, J. This action was upon a policy of life insurance. The defense asserted the non-payment of the premium which fell due on the 25th of October, 1884. For that reason the trial judge ordered a verdict for the defendant, but the judgment entered thereon was reversed by the General Term whose decision we are now required to review.

There is not the least doubt as to the circumstances under which payment of the premium was postponed. Some time before its maturity the assured was considering the prudence of surrendering the policy to the insurer and taking a paid-up policy in exchange for the amount of its surrender value. Having that possible purpose in view, he wrote to the company inquiring for what amount a paid-up policy would be given in exchange. This was on the 3d of July, 1884. Four days later the company sent an answer stating the then present value of the policy and also what it would be in the ensuing October, and adding: "Dr. A. W. Goodale, general agent, at 153 Broadway, will give you further information, or you can write here." The assured was justified in assuming from the reference thus made that the general agent had authority to continue and carry out the negotiation for an exchange of policies as broad and effective as that of the home office. It left the assured to choose between the two in the further prosecution of his purpose. There the matter seems to have rested until the October premium became due. On the day of its maturity a son of the assured testifies that he called upon the general agent at his office in New York and told him that his father had concluded to take a paid-up policy, and then, acting on the supposition that a payment of the premium due was a step necessary to the intended

Opinion of the Court, per FINCH, J.

exchange, offered to the agent in money the amount of that premium. The agent advised a continuance of the existing policy and urged reasons against the substitution proposed. He said that payment of the premium was not necessary to entitle the assured to a paid-up policy, but suggested that the son should go home and talk the matter over with his father and let him decide in view of the suggestions which had been made. Of course that involved delay, and raised the question of what should be done about the premium due and which had been tendered. On that subject the agent said that the assured could come in at any time within a week or ten days and it would be all right. In this way the payment of the premium was prevented by the act and advice of the general agent to whom the company had referred the assured for further information on the subject of the meditated exchange. On the eighth of November the assured died, and two days later the son called at the office of the general agent, paid the premium and took a receipt, the agent saying: "Your father has concluded to continue the policy." This evidence warranted a conclusion that the premium due was tendered to the company but was not accepted through the interference of its general agent, who explicitly waived its immediate payment and consented to receive it whenever the question of a paid-up policy should be so settled as to make the payment of the premium necessary. This view of the transaction is supplemented by written evidence tending in the same direction. On the third of November the general agent, describing himself as "manager" and his office as a "branch office," acknowledged the receipt of the policy in question "to be replaced by paid-up in such amount as has been agreed upon," and adds at the end of the memorandum: "Time extended thirty days, in which to reach a decision with regard to taking paid-up policy." The evidence, therefore, makes it very clear that the default which occurred was a default occasioned by the act of the general agent of the company. The premium was tendered on the day it matured; it was not accepted as needless to a paid-up policy, but the advice

Opinion of the Court, per FINCH, J.

and argument of the general agent was employed to reverse the purpose of the assured, and induce him to keep the old policy in life, and time was given him to choose. The power to choose implied the waiver of any forfeiture and the continued validity of the policy; and so it happens that the default upon which the company relies is a default occasioned and produced not by any neglect of the assured, but by the affirmative act of the general agent to whom the assured had been formally referred. Passing by the inquiry whether the company could avail itself of a default so occasioned, it is at least certain that there was a waiver by the agent of the premium which matured, the effect of which can only be averted by an utter want of authority in the agent himself.

The policy contained the common clause restricting the authority of all agents of the company, and denying to them power "to waive or postpone payment of premiums, or to accept it after" it becomes due, and upon those provisions duly communicated to the assured the company relies.

Two circumstances furnish an answer and raise a question of fact over the agent's authority. It was proved that he had many times accepted the premiums of the assured after their maturity and under circumstances which fairly charged the company with knowledge of the facts, and made their acceptance of the money a ratification of the waiver of prompt payment by the agent. The assured had a right to infer that special permission had been given the general agent to act in that manner at least with reference to that policy. The notice given contemplated that an agent might have such special permission, and when the company, with knowledge of what he was doing, ratified his repeated extensions of time and waivers of prompt payment, it became as to the assured a special permission and a grant of authority so to act. Relying upon that authority, the assured entered into an arrangement by which, in consideration of the waiver by the agent and the extension of time within which to pay, the assured became bound within that time either to pay the deferred premium or take out a paid-up policy for the specified

Statement of case.

amount. That was his implied promise, and each promise was the consideration for the other. (*Homer v. Guardian Mut. Life Ins. Co.*, 67 N. Y. 483.) And this view of the situation is materially strengthened by the act of the company already referred to which gave to the assured a choice to continue his negotiations for a paid-up policy with the home office or the general agent in New York. He was justified in inferring that the general agent was armed with as much authority in the conduct of those negotiations as the home office itself. I think, therefore, that it cannot be said as matter of law there was no valid waiver, and so the reversal by the General Term was right.

That judgment should be affirmed, and judgment absolute for the plaintiff be rendered upon the stipulation with costs.

All concur.

Judgment accordingly.

J. EMMETT WELLS, as Executor, etc., Respondent, v. THE TOWN OF SALINA, Appellant.

119	280
133	486
119	280
173	187
e173	189
e173	239

The powers of towns, and *it seems* other municipal corporations organized for governmental purposes, are limited and defined by the statutes under which they are constituted; they possess only such powers as are expressly conferred by statute or necessarily implied.

Towns have no general power to borrow money for municipal purposes or to pay town charges, but *it seems* it is the policy of the law that such charges shall be met by taxation, and a town may not be made liable for money borrowed on its credit simply because it has been applied for town purposes.

An action having been commenced by certain taxpayers of the town of S. in their own behalf and that of other taxpayers to restrain the enforcement of certain town bonds, and to have the law under which they were issued adjudged unconstitutional, a resolution was adopted at an annual town meeting authorizing the supervisor of the town, on consent of the plaintiffs in said action, to assume control thereof, prosecute it to a final determination and pay all the expenses; and for that purpose to borrow on the credit of the town all sums of money needed. The supervisor, acting in accordance with the resolution, borrowed money on the credit of the town, giving its notes therefor, which money was used for the purpose specified. In an action upon the notes, *held*, that, assuming

Statement of case.

the electors of the town had power to authorize its supervisor to take control of the pending action; also, that it might be treated as if commenced in the name of the town or its supervisor, and that said electors had power to direct money to be raised for prosecuting that action, still this action was not maintainable.

The authorities upon the subject of the power of municipal corporations to borrow money collated.

(Argued January 17, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 2, 1888, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at circuit without a jury.

In the year 1870 the town of Salina, under chapter 570 of the Laws of 1868, issued its bonds to the amount of \$120,000, payable twenty years thereafter, with interest at seven per cent, payable on the first days of August and February of each year. By the terms of section 4 of the act of 1868, the railroad commissioner of the town, an officer created under section 1 of the act, was required "to report to the board of supervisors of the county wherein said town or village is situated, within three days after the commencement of their regular session in each year, the amount of money required to pay the principal and interest on the bonds thus issued, due or to become due and payable during the next ensuing year, after deducting any sums received as dividends on the stock of said company, held by said town or village, which must be first applied to the payment of such principal and interest; and the said board of supervisors shall thereupon cause to be assessed, levied and collected upon such of the real and personal property of the said town or village at the same time and in the same manner as other taxes, such amount of money as shall be thus reported as necessary to pay such principal and interest, and such amount when collected shall be paid and applied by the commissioners to the payment of the said principal and interest of the bonds aforesaid."

In pursuance of this provision the railroad commissioner of the town of Salina, with moneys raised for that purpose, paid

Statement of case.

the interest upon the bonds as it became due to and including August 1, 1880. On December 1, 1880, he presented to the clerk of the board of supervisors a report directed to the board, in which, in conformity with the provisions of the act, he stated the amount required to pay the principal and interest to become due during the next ensuing year. That report was taken by the supervisor of Salina and no action was taken thereon by the board of supervisors. On the 27th of January, 1881, Francis Alvord, who was then supervisor of the town, and Leman B. Pitcher, commenced an action as individuals and taxpayers, in behalf of themselves and all other taxpayers of the town who might come in and contribute to the expense of the action, against various of the bondholders and the railroad commissioner of the town, to restrain the latter from performing the acts required of him by the statute and the former from enforcing their securities. At the same time an injunction was served upon the defendants restraining the railroad commissioner from paying any of the bonds or coupons and from taking any measures for raising money for the payment of such interest. Judgment was demanded in that action, among other things, that the bonds mentioned in the complaint be declared void and surrendered up to be canceled; that all the proceedings for issuing the bonds be adjudged invalid and void; that the statute under which they were issued be declared unconstitutional and void; that the defendants be enjoined from selling, transferring or disposing of any of said bonds in their possession, custody or control during the pendency of the action and until the further order of the court, without giving to the purchaser or purchasers thereof notice of the pendency of the action.

The next annual meeting of the town of Salina, after the commencement of that action, was held on February 15, 1881, and a resolution was there duly adopted which, after reciting the commencement of the action by Alvord and Pitcher as taxpayers of the town of Salina on behalf of themselves and all other taxpayers of the town who would contribute to the

Statement of case.

expenses of the action, requested, authorized and required the supervisor of the town and his successor or successors in office, "to assume the direction and conduct of such action and the prosecution of the same, if permitted by said plaintiffs, and to prosecute the same to a final judgment, and to pay all the expense of such prosecution, and to employ counsel and to borrow upon the credit of the town all such sums of money from time to time as may be necessary for the prosecution of said action." At a town meeting held in February, 1882, another resolution was adopted "authorizing and requiring the supervisor to borrow on the credit of the town not to exceed \$8,400, the amount so raised by him to be used in his discretion for the payment of the expense already incurred, by the litigation then pending, for the purpose of setting aside and cancelling the bonds issued by the town, in aid of the Syracuse Northern Railroad Company, and for the purpose of defending the same against any suit or proceeding which might be brought against the town; and the town board was authorized and required to put that amount into the abstract of town accounts, to be presented to the board of supervisors at its next annual session, to be levied on the town with other taxes."

In pursuance of the first resolution, for the purpose of raising money to defray the expenses of that action, the supervisor, on behalf of the town, made three promissory notes, one dated March 9, 1881, for \$1,500, one dated December 21, 1881, for \$500, and one dated December 31, 1881, for \$1,500; and in pursuance of both resolutions he made another note for \$500, dated April 29, 1882. Upon these notes \$4,000 was borrowed of the plaintiff's testator, Samuel H. Hinsdale, and the money so borrowed was used to defray the expenses of the action named. That action was brought to trial and complaint was dismissed. An appeal was then taken on behalf of the plaintiff to the General Term of the Supreme Court, where the judgment was affirmed, and a further appeal was then taken to this court, where the judgment was finally affirmed. (*Alword v. Syracuse Savings Bank*, 98 N. Y. 599.)

Statement of case.

Thereafter this action was commenced against the town to recover on the four notes made on behalf of the town by its supervisor, as above stated, and to recover the money loaned to the town thereon. The action was put at issue and brought to trial before a judge without a jury, who ordered judgment in favor of the plaintiff.

Louis Marshall for appellant. The findings of the court excepted to are entirely unsupported by the proof, and a legal error was, therefore, committed. (Code Civ. Pro. § 993.) The resolutions under which the notes in suit purport to have been issued, and by virtue of which the money raised thereon is claimed to have been borrowed and expended, are void, being violative of section 11 of article 8 of the state Constitution. (*Conro v. P. H. I. Co.*, 12 Barb. 27; *McCullough v. Moss*, 5 Den. 567, 575, 577; *Warrin v. Baldwin*, 105 N. Y. 534; *Starin v. Edson*, 112 id. 206; Laws of 1872, chap. 161; Code Civ. Pro. § 1925; *Alvord v. S. S. Bank*, 34 Hun, 143; *Parkersburg v. Brown*, 106 U. S. 487; *Kelly v. Pittsburg*, 104 id. 81; *Loan Assn. v. Topeka*, 20 Wall. 655; *McMillen v. Anderson*, 95 U. S. 37; *Weisner v. Village of Douglass*, 64 N. Y. 91; *Allen v. Inhabitants of Jay*, 60 Me. 194; *B. B. Co. v. Brewer*, 62 id. 62; *People v. Lawrence*, 6 Hill, 214; *Hodges v. City of Buffalo*, 2 Den. 110; *Halstead v. Mayor*, Y. 430; *Board of Super. v. Ellis*, 59 id. 620; *Corporation of Guilford*, 1 Den. 510; *People v. Jackson*, 85 44; *People v. Stout*, 23 Barb. 354; *People v. Haws*, Pr. 192; *Stetson v. Kempton*, 13 Mass. 271; *Minot Roxbury*, 112 id. 1; *Coolidge v. Brookline*, 114 id. 1; *West v. Belmont*, 6 Allen, 152; *Parsons v. Goshen*, 11 6; *Claffin v. Hopkinton*, 4 Gray, 502; *Fowler v. ,* 134 Mass. 80; *Matthews v. Westborough*, Id. 155; *gh v. Wakefield*, 127 id. 275; *Hanger v. City of Des* 52 Ia. 193; 35 id. 266; *Comrs. v. Bradford*, 72 Ind. 106; *Murphy v. City of Jacksonville*, 18 Fla. 318; *Mead v.* 39 Mass. 341, 344; *Atty.-Genl. v. Mayor, etc.*, 2 Myl. 106; *Queen v. Mayor, etc.*, L. R. [6 Q. B.] 652;

Statement of case.

State v. Tappan, 29 Wis. 664.) Assuming that the resolutions are not within the inhibition of the Constitution they are nevertheless violative of the statutory provisions regulating the liability of towns, and create no charge against the defendant. (*Cornell v. Town of Guilford*, 1 Den. 510; *Palmer v. P. R. Co.*, 11 N. Y. 476; 1 R. S. 337, §§ 1, 2; Id. 340, § 5; Id. 356, § 1; Id. 349, § 2; 2 id. 473, § 92; *People ex rel. v. Town Auditors*, 74 N. Y. 310; *Town of Lyons v. Cole*, 3 T. & C. 431; *Denton v. Jackson*, 2 Johns. Ch. 336.) There can be no recovery in this action upon the promissory notes executed by Alvord, as supervisor, or even for money had and received, since the resolutions, under which they purport to have been executed, provided that the town should borrow money upon its credit for the prosecution of the action, and no statutory authority exists which empowers the town to pledge its credit by means of a promissory note. (*Ketchum v. City of Buffalo*, 14 N. Y. 356; Burroughs on Public Sec. 177; Dillon on Municipal Bonds, 12, 13, 14; 2 Daniels on Neg. Ins. § 1528; Jones on R. R. Sec. § 283; *Town of Hackettstown v. Swackhamer*, 37 N. J. L. 192; *Knapp v. Mayor, etc.*, 39 id. 394; *Mayor, etc., v. Ray*, 19 Wall. 475, 481; *Atty.-Gen. v. Corporation of Litchfield*, 13 Simon, 547; *Parker v. Bd. of Supervisors*, 106 N. Y. 410, 411; *Starin v. Genoa*, 23 id. 449; 1 R. S. 355, § 49; *Warrin v. Baldwin*, 105 N. Y. 534; *Osterhoudt v. Rigney*, 98 id. 422; *Peo. ex rel. v. City of Elmira*, 82 id. 80.) The resolution adopted by the town meeting of 1882, afforded the supervisor no authority for executing any of the notes in suit and cannot be made the basis of liability, because no action was taken thereunder, as required by its terms. (*Shepherd v. Mayor, etc.*, 96 N. Y. 137.) Plaintiff can recover in this action, if at all, only upon the notes in suit. (*Preston v. Yates*, 24 Hun, 534.)

William G. Tracy for respondent. Most of the findings of fact excepted to are immaterial, and the judgment should not be reversed for any error in detail therein. (*Caswell v. Davis*, 58 N. Y. 223.) The action commenced by Alvord and

Statement of case.

Pitcher against the railroad commissioners of the town and the holders of the bonds, was properly brought and finally settled the controversy in respect to the validity of the bonds of the defendants. (Laws of 1872, chap. 161; Code Civ. Pro. § 1925; *Ayers v. Lawrence*, 59 N. Y. 192; *Metzger v. A. & A. R. R. Co.*, 79 id. 171; *Latham v. Richard*, 12 Hun, 360; *Hillis v. P. S. Bank*, 26 id. 161; *Alvord v. S. S. Bank*, 98 N. Y. 599; *Hurlbert v. Bank*, 1 Abb. [N. C.] 157, 161.) The corporate property of the town of Salina was involved in the action brought by Alvord and Pitcher, and the action was assumed and prosecuted by the town to protect such property. (*Ayers v. Lawrence*, 59 N. Y. 198; Code, § 1925.) Whenever a controversy arises between a town and other persons or corporations, the town may assume the prosecution or defense of a suit which will ascertain the legal rights of the town concerning the matter in controversy. (R. S. [7th ed.] 840, § 4; *Halstead v. Mayor, etc.*, 5 Barb. 218, 222; *Cornell v. Town of Guilford*, 1 Den. 510; *People v. Town Auditors*, 74 N. Y. 310; 10 Hun, 551.) The right of plaintiff to recover is not barred because no appeal was taken by plaintiffs Alvord and Pitcher in their action, from the judgment dismissing the complaint as to the railroad commissioner, nor by section 21 of article 8 of the Constitution. (34 Hun, 143; 98 N. Y. 599.) The moneys represented by the notes in question are town charges, because authorized to be raised by the vote of the town meeting for a town purpose. (R. S. [7th ed.] 842, title 6, § 2, subd. 3; *Horn v. Town of New Lots*, 83 N. Y. 100; *Morey v. Town of Newfane*, 8 Barb. 645; *People ex rel. v. Town of Hempstead*, 4 Hun, 94.) Francis Alvord was duly appointed the agent of defendant, and not having exceeded his authority the defendant is bound by his acts. (*Cushing v. Stoughton*, 6 Cush. 389.) This action can be sustained upon the notes or upon the original consideration of the notes. (*Geriwig v. Sitterly*, 56 N. Y. 214; *Pilcher v. Brayton*, 17 Hun, 429; *Bolen v. Crosby*, 49 N. Y. 183; *O. Bank v. O. Bank*, 21 id. 490.)

Opinion of the Court, per EARL, J.

EARL, J. The action commenced by Alvord and Pitcher, if successful, would necessarily have inured to the benefit of the town and all its taxpayers, and we will, therefore, assume that the electors of the town at the town meetings in 1881 and 1882 had the power to direct the supervisor, with the consent of the plaintiffs in that action, to assume the control, direction and prosecution thereof on behalf of the town, and that that action may, therefore, be treated as if it had been actually commenced in the name of the town or its supervisor. We will also assume that the electors at the town meetings had the power to direct money to be raised for prosecuting that action, and, furthermore, that the \$4,000 was borrowed to defray the expenses of that action, and was actually used for that purpose; and yet we are constrained to hold that this action cannot be maintained.

Business corporations, unless restrained by their charters, possess the power to borrow money and issue securities therefor. Generally they could not carry on their authorized and legitimate business without such a power, and, hence, it must be presumed that the legislature intended that they should possess it. But towns and other municipal corporations are organized for governmental purposes, and their powers are limited and defined by the statutes under which they are constituted. They possess only such powers as are expressly conferred or necessarily implied. They are clothed with the power of taxation, and can thus raise all the money needed for ordinary municipal purposes, and until the money can thus be raised, as it can be at brief intervals, experience has demonstrated their ability to obtain upon credit all the materials and services needed without a resort to loans of money upon credit. It is the general, if not the universal, law of this country, and of England, that municipalities are not empowered to borrow money for municipal purposes, unless expressly authorized to do so by statute, or in the absence of a statute, unless the power is necessarily implied from some special duty imposed, for the discharge of which the power to borrow is not only convenient, but necessary.

Opinion of the Court, per EARL, J.

We do not find in the statutes of this state that the power to borrow money has been expressly conferred upon towns, or is necessarily implied. This, we think, will clearly appear from a brief examination of the statutes. It is provided in part 1, chapter 11, title 1, article 1 of the Revised Statutes, that "no town shall possess or exercise any corporate powers, except such as are enumerated in this chapter, or shall be especially given by law, or shall be necessary to the exercise of the powers so enumerated or given." Among the powers enumerated are the following: "To make such contracts, and to purchase and hold such personal property, as may be necessary to the exercise of its corporate or administrative powers." This provision clearly does not authorize the borrowing of money upon the credit of the town, unless it can be shown that such borrowing is necessary "to the exercise of its corporate or administrative powers." In title 2, article 1 of the same chapter, it is provided that the electors of a town at the annual town meeting shall have power "to direct the institution or defense of suits at law or in equity, in all controversies between such town and corporations, individuals or other towns;" and "to direct such sum to be raised in such town for prosecuting or defending such suits, as they may deem necessary." What is here meant by the word "raised?" It certainly does not mean "borrowed," and evidently means raised by taxation. In the same article it is provided that electors at a town meeting shall have power "to direct such sum to be raised in such town for the support of common schools for the then ensuing year, as they may deem necessary, to make such provisions and allow such rewards for the destruction of noxious weeds as they may deem necessary, and to raise money therefor, to direct such sum to be raised in such town for the support of the poor for the ensuing year as they may deem necessary, and every town may raise any money that may be necessary to defray any charges that may exist against the overseers of the poor of such town;" and special town meetings may be "called for the purpose of raising money for the support of common schools, or of the poor, to vote on the, question of raising money for the construc-

Opinion of the Court, per EARL, J.

tion and maintenance of any bridge or bridges," and "for the purpose of deliberating in regard to the institution or defense of suits, or the raising of moneys therefor." In part 1, chapter 16, title 1, article 1, of the Revised Statutes, it is provided that "the commissioners of highways of each town shall deliver to the supervisor of such town, a statement of the improvements necessary to be made on the roads and bridges, together with the probable expense thereof, which supervisor shall lay the same before the board of supervisors at their next meeting. The board of supervisors shall cause the amount so estimated to be assessed, levied and collected in such town in the same manner as other town charges; but the moneys to be raised in any such town shall not exceed in any year the sum of \$250;" and in chapter 274 of the Laws of 1832, section 1, it is provided that "whenever the commissioners of highways of any town in the state shall be of opinion that the sum of \$250, as now allowed by law, will be insufficient to pay the expenses actually necessary for the improvement of roads and bridges, it shall be lawful for such commissioners to apply in open town meeting for a vote authorizing such additional sum to be raised, as they may deem necessary for the purpose aforesaid, not exceeding \$250, in addition to the sum now allowed by law;" and section 5 provides that "if any town shall at an annual meeting have already voted to raise a sum exceeding \$250, for the purposes aforesaid, it shall be the duty of the board of supervisors of the county in which such town is situated to assess, levy and collect the sum so voted to be raised upon said town." In chapter 305 of the Laws of 1840, the boards of supervisors are authorized and directed to cause "to be levied and raised" the amounts audited and allowed by boards of town auditors. In chapter 197 of the Laws of 1847, it is provided that, "the board of supervisors in any county may, in their discretion, cause any money, or any portion thereof, voted by towns, before the passage of this act, for building town-houses, to be raised in said towns for such purpose." In chapter 513 of the Laws of 1872, chapter 410 of the Laws of 1874, chapter

Opinion of the Court, per EARL, J.

554 of the Laws of 1880, and in numerous other statutes, the word "raise" or "raised" is used in the same sense; and so far as we can discover it is never used in the sense of "borrow" or "borrowed." The power to raise money for municipal purposes, it is believed, never means a power to borrow unless there is other language qualifying or extending its meaning. (*Stetson v. Kempton*, 13 Mass. 272; *Frost v. Inhabitants of Belmont*, 6 Allen, 152; *Claflin v. Inhabitants of Hopkinton*, 4 Gray, 502; *Minot v. Inhabitants of West Roxbury*, 112 Mass. 1; *Mead v. Acton*, 139 id. 341.)

There was not only no express authority conferred upon the town to borrow this money, but it did not possess the power by necessary implication. The credit of the town would have been sufficient for the prosecution of the taxpayers' action, until money could be raised to meet the expenses by the ordinary mode of taxation.

We have assumed that the maintenance of that action was a town purpose, and that the expense thereof was a town charge; but the expense was to be met like all other town charges. Towns have no power to borrow money simply because it is useful and intended to pay a town charge. The expenses of the town poor and of town bridges and of town officers are all town charges, and yet no one would contend that the town could borrow money to meet these charges instead of meeting them in the mode prescribed by statute, by taxation. In part 1, chapter 11, title 6 of the Revised Statutes, it is provided that "the moneys necessary to defray the town charges of each town shall be levied on the taxable property in the town in the manner prescribed in this act."

It is the policy of the laws that town charges shall be met by annual recurring taxation, and thus extravagance and improvidence are in some degree checked, as those who create town charges or are the taxpayers when they arise, must bear the burden of taxation to meet them. It is quite easy for the taxpayers of to-day to create a debt which they are not to feel and which the taxpayers of the future are to discharge. The system of laws relating to towns requires that all bills for

Opinion of the Court, per EARL, J.

moneys expended or materials furnished, or services rendered to the town shall be verified and presented to the board of town auditors and audited by them, and then enforced by warrants of the board of supervisors against the taxpayers of the town. This whole system would be subverted if towns could borrow money upon credit to meet town charges. Then the money would have to be repaid whether the town had had the benefit thereof or not, and the wise provisions of the statutes to secure economy and safety by the audit of accounts would be entirely frustrated.

The danger of allowing money to be borrowed on the credit of the town for such a town purpose as we have here, is quite clearly illustrated in this case. Here the sum of \$8,400 was authorized to be borrowed to carry on an ordinary litigation, and \$1,500 was paid to the attorney long before the trial of the action, and thereafter \$3,000 more was paid to him for his services and expenses, and there remains still a balance due. The bills for services and expenses have never been audited or allowed in the mode prescribed by the statutes. There was no proof upon the trial that the money borrowed was actually needed for the prosecution of that action, or that it was prudently, honestly or wisely used. But even if we should assume that it had been sufficiently established that the town had the full benefit of the money thus borrowed, that would not authorize the maintenance of this action. If a town could be made liable for money borrowed simply because it had been applied for town purposes, then the entire system for the audit and allowance of town charges would be overturned. Even if the plaintiff's testator by the payment of the expenses of that litigation became the equitable assignee of the bills representing such expenses, and might have taken and presented those bills for audit to the board of town auditors, yet he never did so. He did not bring his action upon the theory that he was an equitable assignee of those bills, and he gave no proof which entitled him to recover as an equitable assignee, and the case was not tried upon that theory. Our conclusion, therefore, is that upon the facts as they appear in this

Opinion of the Court, per EARL, J.

record the complaint should have been dismissed; and for this conclusion there is abundance of authority.

In *Hanger v. City of Des Moines* (52 Iowa, 193), it was said: "It is well settled that a municipal corporation can exercise only such powers as are expressly granted by statute, and such as are necessarily and fairly implied in, or incident to, those conferred by express grant, and 'those essential to the declared object and purpose of the corporation.' " And to the same effect are the following authorities: *Minot v. Inhabitants of West Roxbury* (*supra*); *Anthony v. Adams* (1 Met. 284); *Parsons v. Inhabitants of Goshen* (11 Pick. 396); *Lennon v. City of Newton* (134 Mass. 476); *Cornell v. Town of Guilford* (1 Denio, 510); *Board of Supervisors v. Ellis*, (59 N. Y. 620).

In *Town of Hackettstown v. Swackhamer* (37 N. J. L. 191), it was held that municipal corporations, in the absence of a specific grant of power, do not in general possess the capacity to borrow money, and that a note given for an unauthorized loan cannot be enforced, although the money borrowed has been expended for municipal purposes. BEASLEY, Ch. J., writing the opinion, said: "I am at a loss to perceive how it can be inferred that a power to borrow money is an appendage to the usual franchises given to municipal corporations. Such a right cannot, in any reasonable sense, be said to be necessary within the meaning of that term as already defined. Under ordinary circumstances it is not certainly indispensable, as common experience demonstrates. In the great majority of instances the municipal affairs are, with ease and completeness, transacted without it. * * * My remarks are to be restricted to that class of cases where charters are granted containing nothing more than the usual franchises incident to municipal corporations, and under such conditions it seems clear to me that the power to borrow money is not to be deduced. I have already said that it does not appear to be a necessary incident to the powers granted, for such powers can be readily and efficiently executed in its absence. It would be to fly in the face of all experience to claim that the ordinary

Opinion of the Court, per EARL, J.

municipal operations cannot be efficiently carried on, except with the assistance of borrowed capital. Without any help of this kind, it is well known that our towns and cities have long been, and are now being, improved and governed. For the attainment of these ends it has not generally been found necessary to resort to loans of money. The supplies derived annually from taxation have been found amply sufficient for these purposes; consequently I am unable to perceive any necessity to borrow money under these conditions, from which the gift of such power to borrow is to be implied. It undoubtedly is clear that if, as has been asserted, the ends of the municipal charter can be conveniently reached, without a resort to the device of raising moneys by loan, there is not the least legal basis for a claim of the power to obtain funds in that way. Granted the fact that the charter can be executed with reasonable ease and with completeness, the conclusion is inevitable that the power in question cannot be called into existence by intendment, and as I claim the fact to exist I must, of necessity, reject the right of implication in question."

In *Ketchum v. City of Buffalo* (14 N. Y. 366), SELDEN, J., writing the opinion of the court said: "It is true the power to contract to pay A. \$10,000 at the end of the year for doing certain work, and the power to borrow \$10,000 of B. upon a credit of a year for the purpose of paying A. for doing the work might seem at first view to be substantially identical. The amount is the same and the time of payment the same; the credit only is different. A little examination, however, will show that there is a very material difference between the two. If the power of the corporation to use its credit is limited to contracting directly for the accomplishment of the object authorized by law, then the avails or consideration of the debt created cannot be diverted to any illegitimate purpose. The contract not only creates the fund, but secures its just appropriation. On the contrary, if the money may be borrowed the corporation will be liable to repay it, although not a cent may ever be applied to the object for which it was avowedly obtained. It may be borrowed to build a market

Opinion of the Court, per EARL, J.

and appropriated to build a theatre, and yet the corporation would be responsible for the debt. The lender is in no way accountable for the use made of the money. It is plain, therefore, that if the policy of limiting the powers and expenditures of corporations to the objects contemplated by their charters is to be carried out, their right to incur debts for those objects must be strictly confined to contracts which tend to their direct accomplishment. * * * No one can fail to see that to concede to corporations the power to borrow money for any purpose, would be entirely subversive of the principle which would limit their operations to legitimate objects."

In *Starin v. Town of Genoa* (23 N. Y. 439), LOTT, J., writing the opinion said: "The towns of this state have not the general power to borrow money, nor are their officers, in the exercise of their ordinary duties, authorized to issue bonds or any other evidence of indebtedness in the name of the towns represented by them for loans or other debts contracted or incurred on their behalf."

In *Parker v. Board of Supervisors of Saratoga Co.* (106 N. Y. 392), ANDREWS, J., said: "The contention that boards of supervisors have no inherent power to borrow money or to issue negotiable paper, accords with the general understanding and with the tenor of the adjudged cases, and the course of legislation, which presupposes the necessity of express legislative sanction in order to justify the exercise of this authority. In this state the powers of boards of supervisors are not only the subject of express affirmative definition, but for the purpose of confining the action of these bodies to the exercise of enumerated powers, it is declared that 'no county shall possess or exercise any corporate powers, except such as are enumerated or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or given.' The power of borrowing money is incident to the powers of a business corporation, unless excluded by its charter. Boards of supervisors have the recourse of taxation for the raising of money for county purposes. The power to borrow money is not necessary to the execution of powers

Opinion of the Court, per EARL, J.

expressly given. But the denial of this power to those *quasi* public corporations also stands strongly upon considerations of public policy, and the doctrine that they have no implied power to borrow money is an important safeguard to the protection of political communities against the creation of ruinous liabilities through the action of incapable, negligent or unfaithful public agents. We concur, therefore, with the proposition that the power of the board of supervisors to extend the original debt by means of new loans, or by renewals of prior obligations, if it existed, must be found in the statute, given either expressly or by implication."

In *Mayor, etc., v. Ray* (19 Wall. 468), Mr. Justice BRADLEY wrote an opinion, in which Justices MILLER, DAVIS and FIELD concurred, in which he said: "A municipal corporation is a subordinate branch of the domestic government of a state. It is instituted for public purposes only, and has none of the peculiar qualities and characteristics of a trading corporation instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities and its powers are different. As a local governmental institution it exists for the benefit of the people within its corporate limits. The legislature invests it with such powers as it deems adequate to the ends to be accomplished. The power of taxation is usually conferred for the purpose of enabling it to raise the necessary funds to carry on the city government, and to make such public improvements as it is authorized to make. As this is a power which immediately affects the entire constituency of the municipal body which exercises it, no evil consequences are likely to ensue from its being conferred, although it is not unusual to affix limits to its exercise for any single year. The power to borrow money is different. When this is exercised the citizens are immediately affected only by the benefit arising from the loan; its burden is not felt until afterwards. Such a power does not belong to a municipal corporation as an incident to its creation. To be possessed it must be conferred by legislation, either express or implied. It does not belong, as a mere matter of course, to local govern-

Opinion of the Court, per EARL, J.

ments to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers, and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the corporation. Evidence of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation. Our system of local and municipal government is copied, in its general features, from that of England. No evidence is adduced to show that the practice of borrowing money has been used by the cities and towns of that country without an act of parliament authorizing it. We believe no such practice has ever obtained. * * * If, in the exercise of their important trusts, the power to borrow money and to issue bonds, or other commercial securities, is needed, the legislature can easily confer it under the proper limitations and restraints, and with proper provisions for future payment. Without such authority it cannot be legally exercised."

In *Attorney-General v. Corporation of Lichfield* (36 Eng. Ch. R. 546) the case was one where £200 pounds were borrowed of one Mallett and used for the ordinary expenses of the corporation; and it was held that the corporation had no authority to borrow money, and its treasurer was restrained from paying out of the funds of the corporation the money thus borrowed. To the same effect are the following text-books: Dillon on Municipal Bonds, pp. 13, 14; Burroughs on Public Securities, § 177; Jones on Railroad Securities, §§ 222, 283; Daniels on Negotiable Instruments, § 1530. In the latter authority the learned author says: "But there is a fundamental difference between contracting a debt to one person and borrowing money from another to pay it. It may be convenient to do so, but it cannot be necessary, and the power to contract a debt to A. cannot, by any reasonable intendment, be construed into a power to borrow money from B. In the one case the application of the credit is secured to

Opinion of the Court, per EARL, J.

the advancement of the authorized object, while money borrowed is liable to be lost, to be squandered, or to be diverted to illegitimate purposes."

In *McDonald v. Mayor, etc.* (68 N. Y. 23), it was held that where a municipal charter prohibits its officers from contracting on its behalf for the purchase of materials, save in cases and in a manner specified, the municipality is neither liable upon a contract made by an official in violation of, or without a compliance with the requirements of the charter, nor can the value of materials furnished under the contract be recovered upon any implied liability. In that case Judge FOLGER said: "It may be that where a municipality has come into the possession of the money or the property of a person without his voluntary, intentional action concurring therein, the law will fix a liability and imply a promise to repay or return it." In *Dickinson v. City of Poughkeepsie* (75 N. Y. 65), it was held that a contract for the supply of water in the city of Poughkeepsie was unauthorized and void, and that being void when executed, its execution did not confer upon the contractor any right of action thereunder, and that no recovery thereon could be had upon a *quantum meruit*. Judge HAND there said: "If the execution of a contract, the making of which is prohibited as against public policy, absolutely cures its invalidity, a mere continuance in violation of law would have certainly a strange result. It is difficult to see what use or force there could be in such prohibitions, so general as to municipalities and so much a part of our policy in this state, if the consummation of their violation brings with it the protection of the law and a right of action for payment upon the void contract."

The money for which the plaintiff here seeks to recover was not taken from his testator against his will. On the contrary, his testator delivered it to Alvord, knowing, as we must assume, that he had no right to borrow it on behalf of the town, and that he had no agency on its behalf in reference thereto. This is not, therefore, like a case where the money or property of one is taken against his will without authority

Statement of case.

of law or in violation of law and applied to the use or benefit of a municipality.

We have regarded this as a case of great public importance, and we have, therefore, given it very careful consideration. The extended citations from authorities of acknowledged weight, and from the opinions of judges of great repute, furnish ample reasons for the conclusion we have reached. There is no possible ground which we can perceive for the maintenance of this action, and it is better that the litigation should end here.

The judgment of the General Term and that entered at the Trial Term should, therefore, be reversed and the complaint dismissed, with costs.

All concur, except RUGER, Ch. J., and ANDREWS, J., taking no part.

Judgment accordingly.

119	298
128	626

WILLIAM R. H. MARTIN et al., Appellants, v. FRANK T. GILBERT, as Sheriff, etc., Respondent.

In an action to recover the possession of personal property, when the defendant gives an undertaking for the return of the property, admitting therein that plaintiff has taken the property described in his affidavit and requisition from defendant's possession, he is estopped from denying that he had possession of the property, or any part thereof, at the commencement of the action, or from showing that it was different or other property; he is concluded by the recitals in the undertaking.

Miller v. Moses (56 Me. 128) distinguished.

The effect of the recital, as an estoppel, is not taken away by the fact that after the return of the property to the defendant, he serves an answer, denying that he ever had possession of the property mentioned in the complaint or affidavit accompanying the requisition; nor is its effect disturbed by the provision of the Code of Civil Procedure (§ 1704), giving defendant a right to a return of the property replevied, on giving a bond, although it be not the property described in the requisition.

It seems, where the property replevied is not that described, it is not necessary or proper to recite in the bond that it is.

Carpenter v. Buller (8 M. & W. 208); *Reed v. McCourt* (41 N. Y. 485) distinguished.

Statement of case.

In such an action, as plaintiff's affidavit, requisition and the return of the officer are made by the Code of Civil Procedure (§ 1717) part of the judgment-roll and a copy of them is required to be furnished to the court or referee on trial, it is not necessary to put them formally in evidence in order that the court may consider them.

(Argued January 17, 1890; decided February 25, 1890.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 19, 1888, which reversed a judgment in favor of plaintiffs entered upon the report of a referee, and granted a new trial.

This action was brought for the purpose of recovering the possession of certain personal property described in the complaint as ready-made clothing, "and being four overcoats, 223 coats, 224 vests, 243 pairs of pants, 36 boys' suits, one pair boys' pants."

It was alleged in the complaint that the plaintiffs sold the above property and delivered the same to one Ruslander, but that he had procured them through false and fraudulent representations, and that, by reason of such representations, plaintiffs elected to rescind the contract of sale and recover possession of the property. It was also alleged that the defendant, Gilbert, was the sheriff of Erie county, and that he unlawfully detained the chattels above described, claiming to hold them by virtue of several writs of execution issued against the property of Ruslander by some of his creditors, and that, prior to the commencement of this action, the plaintiffs had demanded of the defendant the delivery of said goods, and that the defendant had refused to deliver the same. It was also stated, that on the 24th of November, 1886, a writ of replevin was duly issued in this action to the coroner of Erie county, requiring him to take from the possession of the defendant these articles of personal property; that under and by virtue of the writ the coroner duly replevied and took from the defendant such property, and that, thereafter, and on the 27th of November, 1886, the defendant duly executed to the coroner a bond

Statement of case.

or undertaking entitled in this action, a copy of which is annexed to the complaint; that after the execution and delivery of the same, the sureties justified and the undertaking was approved, and the goods and chattels were delivered by the coroner back to the defendant; that the chattels were worth \$3,622.87, and that by reason of the wrongful detention of the goods by defendant, the plaintiffs had sustained damage to the value of \$250.

The material allegations in the complaint were denied by the answer.

Upon the trial of the action the plaintiffs put in evidence the bond or undertaking given by the defendant upon retaking the goods which the coroner had replevied from him by virtue of the writ in this action. The undertaking is preceded by the title of the case, and then it is stated as follows:

“WHEREAS, the plaintiffs in this action claim the delivery to them of certain chattels specified in the affidavit made on behalf of the plaintiffs for that purpose, of the alleged value of three thousand six hundred and twenty-two 87-100 dollars, and have caused the same to be taken by the coroner of Erie county, pursuant to the Code of Civil Procedure, but the same has not yet been delivered to the plaintiffs; and, whereas, the defendant requires a return of the chattels replevied,

“Now, therefore, we, Charles A. Sweet, of the city of Buffalo, county of Erie, by occupation a banker, and Charles G. Curtiss, of the same place, by occupation a maltster, do hereby jointly and severally undertake and become bound to the plaintiffs in the sum of seven thousand two hundred and forty-five dollars and seventy-four cents, for the delivery of the said chattels to the plaintiffs, if delivery thereof is adjudged, or if the action abates in consequence of the defendant's death, and for the payment to the plaintiffs of any sum which the judgment awards against the defendant.

“Dated this 27th day of November, 1886.

“CHARLES A. SWEET,
“CHARLES G. CURTISS.”

Statement of case.

This undertaking, although not signed by the defendant, was procured by him, and his attorney noticed the matter for a hearing for the justification of the sureties, and it was by reason of the giving of such undertaking that the property was returned to the defendant.

The trial resulted in a report in favor of the plaintiffs for the full amount claimed, upon which judgment was entered in their favor. Other facts are stated in the opinion.

Hadley Jones and *Abraham Gruber* for appellants. The defendant was estopped by giving the bond to retake the goods and thus procuring the re-delivery of the same to him from proving that all the goods replevied were not in his possession at the time the writ of replevin was executed. (*Carpenter v. Stearns*, 32 Mo. App. 132; *Diossy v. Morgan*, 74 N. Y. 11; *Auerbach v. Marks*, 12 Wkly. Dig. 155; *Haggart v. Morgan*, 5 N. Y. 422; *Harrison v. Wilkin*, 69 id. 412; *Lucas v. Beebe*, 88 Ill. 427; *Frost v. White*, 14 La. Ann. 140; *McMillan v. Dana*, 18 Cal. 339; *Shaw v. McCullough*, 3 W. Va. 260; *Dickson v. Anderson*, 9 Mo. 155; *Mead v. Figh*, 4 Ala. 279; *Sponenberg v. Lemest*, 23 Kan. 35-42; *S. B. Co. v. Niederweisser*, 28 Mo. App. 233; Code, §§ 1694, 1698, 1703, 1704, 1713, 1715, 1716; *Anthony v. Barthalow*, 69 Mo. 186, 194.) If plaintiff had a right to rely on the recitals in the undertaking, then the defendant was estopped from contradicting its recitals. (*Coleman v. Bean*, 3 Keyes, 94; *Harrison v. Wilkin*, 69 N. Y. 412.) Acquiescent reliance upon the defendant's statements in the undertaking was an alteration of the plaintiffs' position sufficient to estop the defendant from denying the truth of those statements. (*C. N. Bank v. N. Bank*, 50 N. Y. 575.) The coroner's return was conclusive on both parties to this action, as to the character and amount of goods taken and its contents could not be disproved on the trial. (*Russell v. Gray*, 11 Barb. 541; *Anthony v. Barthalow*, 69 Mo. 186, 194; *Schnaider Brewing Co. v. Niederweisser*, 28 Mo. App. 233; Code, §§ 172, 1715, 1716; *Kellogg v. Boyden*, 126 Ill. 378.) The recitals in the bond were a substantive part thereof, and it was

Statement of case.

not competent to vary them by parol evidence. (*Cocks v. Barker*, 49 N. Y. 107.) The General Term was clearly wrong in holding that it is upon the coroner's return only that the plaintiff could rely for information of the property taken by the officer. (Code, §§ 1706, 1715; *Harrison v. Wilkin*, 69 N. Y. 412.) The question as to the sufficiency of the description of the goods is not properly before this court. (*W. Bank v. Hobbs*, 22 How. Pr. 494; *Kellogg v. Boyden*, 126 Ill. 378.) The demand for the goods in suit was sufficient. (*White v. Dodds*, 42 Barb. 554; *E. F. Co. v. Hersee*, 33 Hun, 169, 181; *Clafin v. Milspaw*, 107 N. Y. 649.) The referee properly allowed the plaintiffs \$250 damages for the wrongful detention of the goods. (*N. Y. G. & I. Co. v. Flynn*, 55 N. Y. 653.)

B. Frank Dake for respondent. Under the plaintiffs' stipulation in the notice of appeal it is the duty of the court to affirm the order appealed from and award absolute judgment in favor of the defendant, if there was any reason why it was the duty of the General Term to reverse the judgment and award a new trial. (*Halcombe v. Munson*, 4 N. Y. S. R. 250, 253.) No conversion of the property was proved. (*Gillett v. Roberts*, 57 N. Y. 28, 33; *Whitney v. Slanson*, 30 Barb. 276; 1 N. Y. 522; *Southwick v. F. N. Bank*, 84 id. 420; *Goodwin v. Wertheimer*, 99 id. 149; *Bliss v. Cottle*, 32 Barb. 322; *Mulheisen v. Lane*, 82 Ill. 117; *Thompson v. Rose*, 16 Conn. 71; *Goodwin v. Wertheimer*, 99 N. Y. 149; 2 Greenl. on Ev. § 644.) The referee's report is faulty in the respect that it not only fails to find the value of the goods "at the time of the trial," but assumes to assess their value and awards judgment for their value "at the time of such replevy." (Code, § 1726; *Hurd v. Birch*, 11 N. Y. S. R. 870, 871.) The motion for a nonsuit should have been granted on the ground that the complaint does not state a cause of action. (Code Civ. Pro. §§ 1373, 1695, 1697; 3 Blackst. Comm. 151; *Dowell v. Richardson*, 10 Ind. 573; *Ames v. M. B. Co.*, 8 Minn. 467; Wells on Replevin, § 171; *De Witt v. Morris*, 13 Wend. 496; *Wheeler v. Allen*, 51 N. Y. 37; *McAdam v. Wal-*

Opinion of the Court, per PECKHAM, J.

bran, 8 Civ. Pro. Rep. 451.) The sheriff is not estopped from proving that the property replevied did not comprise all the property to recover possession of which this action was brought. (*Brooks v. Higby*, 11 Hun, 235; *Burnham v. Brennan*, 10 J. & S. 49; *Dunford v. Weaver*, 84 N. Y. 445, 451; Code Civ. Pro. §§ 1703, 1704, 1713; *Talcott v. Belden*, 4 J. & S. 84, 92.)

PECKHAM, J. The defendant claims that neither the affidavit to obtain the requisition, nor the requisition itself, nor the return of the coroner is in evidence in this case. He says that not one of them was formally put in evidence, and that, therefore, the court has no right to regard them or any of them. We do not think it was necessary to formally put those papers in evidence in order to have them considered by the trial court. By section 1717 of the Code of Civil Procedure, all of such papers must be made a part of the judgment-roll in the action, and a copy of each of them must be furnished to the court or referee upon the trial of the issue of fact. In looking over the case it would seem to have been tried upon the assumption that the papers were not only in existence but were to be regarded by the referee for all legitimate purposes. Taking them into consideration, we find a statement in the affidavit that "the plaintiffs are the owners of the following chattels hereinafter particularly described, viz.: Ready-made clothing as follows: Four overcoats, 223 coats, 224 vests, pants, 243 pairs, 36 boys' suits, one pair of boys' pants." The requisition is to the coroner of the county of Erie, and he is required to replevy the chattels described in the within affidavit. And the coroner certifies and returns that on the 26th of November, 1886, he executed the requisition indorsed on the affidavit annexed, for the delivery of the chattels mentioned in the said affidavit, "by taking possession of all thereof to be found in my county, to wit: Four overcoats, 223 coats, 243 pants, 224 vests, 36 boys' suits, one pair boys' pants." The return further stated that the defendant claimed re-delivery of said chattels by giving to the

Opinion of the Court, per PECKHAM, J.

coroner an undertaking in due form of law, and that the coroner then re-delivered said property to the defendant. In the affidavit a statement is thus found of all the property claimed on the part of the plaintiffs to be in the possession of the defendant, and it is especially described in such affidavit. The requisition requires the coroner to take the property described in the affidavit. The bond given by the defendant in order to keep the property, recites the fact that the plaintiffs claim delivery to them of certain chattels specified in the affidavit made on behalf of the plaintiffs for that purpose, and that they have caused the same to be taken by the coroner of Erie county, pursuant to the Code of Civil Procedure, but the same not having yet been delivered to the plaintiffs, the defendant requires the return of the chattels replevied, and the condition of the undertaking is that the sureties undertake and become bound to the plaintiffs in the sum named for the delivery of the said chattels to the plaintiffs, if delivery thereof is adjudged.

Upon the trial the defendant offered to prove that, of the personal property described in the affidavit made by the plaintiffs, the defendant did not have in his possession, or under his control when the demand was made upon him on the part of the plaintiffs and at the time of the commencement of this action, more than one-quarter, and that no more than one-quarter of such property ever came into his possession, or was in his possession when such property was replevied by the coroner. This evidence was objected to on the part of the plaintiffs as tending to vary or alter the admissions made by the defendant in this action, contained in his undertaking given to the plaintiffs upon the retaking of the goods seized by the coroner, herein described in the affidavit accompanying the requisition. The objection was sustained and the defendant excepted. The General Term of the Supreme Court has held that this was error, and on account thereof has reversed the judgment and granted a new trial.

We think the referee was right in rejecting the evidence. The affidavit of the plaintiffs described all the property

Opinion of the Court, per PECKHAM, J.

claimed by them, and alleged that it was all in the defendant's possession. The requisition required the coroner to take all that property. He proceeded to the execution of his writ and in the course of the same he is met by the action of the defendant, which prevents his complying with the terms of the requisition. To prevent such compliance the defendant offers, as he has a right to do under the statute, an undertaking on his part. That undertaking is provided for by the statute, and in its recital, in order to state for what purpose and under what circumstances it is given, it is set forth in plain language that the plaintiffs claim the chattels specified in the affidavit made on behalf of the plaintiffs, and that they have caused the same to be taken by the coroner of Erie county, pursuant to the Code of Civil Procedure, but the same has not yet been delivered to the plaintiffs, and because the defendant requires the return of the chattels replevied, therefore the sureties agree and undertake, as already mentioned. It was because of this undertaking that the defendant was enabled to retain possession of the property, and that undertaking used by the defendant recites the plain fact of the claim for the property made by the plaintiffs, and that it had been taken by the coroner pursuant to the Code of Civil Procedure. We do not think that under the circumstances the defendant should be allowed to contradict the admissions of fact made in his own bond, by virtue of which he kept the property which had been taken by the coroner, and we think he is properly concluded by the recitals in such bond, upon the question of what property was as matter of fact in his possession and taken by the coroner.

We cannot distinguish this case in principle from that of *Diossy v. Morgan* (74 N. Y. 11).

It is true that the facts in the *Diossy Case* differ from those herein. In the former the stone in controversy was on plaintiff's land and the defendant had placed men at work upon the stone, who were engaged in cutting it and assuming possession and ownership of it. The sheriff took the stone for the plaintiff on the requisition in the replevin action, and the

Opinion of the Court, per PECKHAM, J.

defendant prevented its delivery to plaintiff and procured its delivery to him by reason of the giving of the bond, which contained an admission that the property was taken from the possession of the defendant by the sheriff. The defendant upon the trial sought to show that he did not have possession of the stone when the action was commenced and this evidence was rejected, and upon appeal to this court it was held that such rejection was proper. It is thus seen that there was no dispute as to the identity of the property, which by virtue of his bond the defendant obtained, with that described in the affidavit, and none that such property was then in defendant's possession, and the only question was whether the defendant should be permitted to show that he did not have possession of the property when the suit was commenced, although his bond contained the written admission that he did. This court said, per RAPALLO, J.: "By means of this undertaking the defendants not merely prevented the delivery of the property by the sheriff to the plaintiff, but procured the delivery of it to themselves. The undertaking contains a plain admission that it was taken by the sheriff from their possession and consequently was in their possession at the time of the commencement of the action, etc." And again: "Our holding is that the undertaking contains the admission of a fact, of which the defendants have availed themselves to obtain possession of the property, and that, therefore, they cannot be permitted to retract it, so as to deprive the plaintiff of his right to a redelivery of the property to him."

Has not this defendant caused a bond to be executed, containing a plain admission of a fact, viz.: That the coroner had taken the property described in the affidavit from his (defendant's) possession; and has not the defendant, by reason of the bond containing such admission, procured the coroner to re-deliver to him such property thus taken from him? Certainly he has. If it had not been for the bond the property would have been delivered to the plaintiff, in which event the defendant could have shown that the property taken was not described in the affidavit, or was not that of the plaintiff.

Opinion of the Court, per PECKHAM, J.

Under such circumstances the plaintiffs would have been compelled to prove their whole case, including the fact that the property actually taken from defendant was the property described in their affidavit and in their requisition to the sheriff.

Instead of this, however, the defendant permits the coroner to take the property without a word of denial that it was the identical property described in the affidavit and requisition, and in addition thereto he causes the bond to be executed in order to take back the property, and therein he plainly admits that it is the same property. But now, upon the trial of the case, he asks to be permitted to show that not more than one-quarter of the property that was taken was that which was described in the affidavit. To allow this is to violate the principle of the *Diossy Case*, which was, that what was solemnly admitted as a fact by an admission in the bond, should not be contradicted on the trial. It is also most unjust that it should be otherwise. Where property is taken under a requisition, and the plaintiff sees by the bond which has been executed, and which, by the Code, is to be delivered to him by the sheriff (§ 1708), a plain and distinct admission that the officer has taken the property described in plaintiff's affidavit and requisition, he has a right to rely on such admission and take no further steps towards proving the point as to the possession by the defendant of the very property described in the requisition. He may also give up any attempt to seek further for property which the defendant solemnly admits he is himself in possession of. Otherwise, and in just such a case as this, the defendant having obtained delivery of the property upon executing the bond, and not having made the least denial or question at the time of the taking, but that the property taken was the same as the property described in the requisition, may at once sell or otherwise dispose of it. By so doing the plaintiff is precluded from any further examination of the property, and cannot in that way strengthen his contention that it was identical with that named in the affidavit. In addition to that the plaintiff is thrown off his guard by the

Opinion of the Court, per PECKHAM, J.

defendant's conduct and admission, and naturally would not on that very account take such steps and secure such proof as might otherwise be then procured to prove his case on that point.

Upon the trial, however, the defendant, notwithstanding his admission in his bond, asks to show that the property is not identical, and he thus endeavors to reap the advantage which the admission has given him in causing the plaintiffs to rely upon the same, and to come unprepared for the trial of such an issue.

Is it right that he should have such an opportunity at the plaintiffs' expense?

The course of the trial herein shows that the plaintiffs did rely entirely upon the admission in the bond for the purpose of proving the identity of the goods taken from defendant's possession with those described in the affidavit and requisition, and the bond was received in evidence for that purpose. If the denial had been made when the property was taken, the plaintiffs could have looked into the question more fully and have satisfied themselves either that the defendant was wrong, or, if right, could have given it up and made further search regarding the property they claimed. If they concluded to take it, and the sheriff was satisfied, then they would have been much more careful as to procuring proof of the identity of the goods claimed with those taken, and much better prepared to prove such fact upon the trial. But the course taken by the defendant wholly disarms them upon that point. Assuming the truth of the admission, and that there would be no denial of the fact of identity of goods or possession by defendant, the plaintiffs might naturally and rightfully rely upon such admission as to those facts and simply prepare themselves to prove the other material facts in the case, viz.: Title to the goods that were taken, assuming them to be the goods described in the affidavit and admitted in the bond.

It is to prevent such injustice that the *Diossy Case* says that the fact of the possession of the property by the defendant, which has been admitted in the bond, shall not be contradicted. In that case the injustice worked by the other rule

Opinion of the Court, per PECKHAM, J.

would lie in permitting the defendant to show as a defense the non-existence of a fact which he had already admitted in his bond, and by reason of which he had obtained the property, while in this case the injustice would lie in permitting the defendant to contradict a plain admission in a bond, by reason of which bond the property taken from him was restored to the defendant with all the advantages which such possession could give to him. The hardship would be with the plaintiffs to allow such proof.

If the defendant desire to raise the question of identity, he should raise it, not by admitting it in the bond and subsequently contradicting such admission, but he might sue the sheriff for the taking, or leave the property in his hands and try the case, and, if successful, the property would be returned or its value insured to him.

It is said that the recital in the bond was not necessary, as the fact is not, by the statute, made necessary to be stated. I do not see that that makes any difference. The bond itself is required by the statute, and in order to make it in anywise intelligible it is necessary that some statement should be made of the purpose for which it is executed, and the recital in question was made for that purpose, and I cannot see why it should not be just as conclusive in a case where the defendant wishes to deny the possession of part of the property as where he wishes to deny the possession of the whole.

The case of *Weber v. Manne* (42 Hun, 557) was reversed in this court. (105 N. Y. 627.)

The same principle has been held in other states. In *Mead v. Figh* (4 Ala. 279), it was held that a bond for redelivery of a chattel, which recited a levy and contained a promise to produce the chattel, could not be contradicted by showing that there was no such chattel and that the levy was fictitious. The court said: "The law gives the defendant a right to suspend the collection of the money upon his doing certain acts, and it could not be tolerated that he should be permitted afterwards to say these acts are not binding on him because they assert a falsehood."

Opinion of the Court, per PECKHAM, J.

In *Lucas v. Beebe* (88 Ill. 427), it was held that a party in a delivery bond, who therein admits the possession of the property, is bound by it, and if in such a bond proceedings before a justice of the peace in a certain entitled action are recited, the maker of the bond cannot contradict the recital by proof that there was no such suit. It is generally supposed, said the court, parties mean to bind themselves when they solemnly and deliberately make such statements in writing, the truth of which is attested by their signatures and seals.

In *Frost v. White* (14 La. Ann. 140), the same holding is maintained. Property was attached which was bonded by an intervenor, and a motion made to dissolve the attachment on several grounds, one of which was that no property was in fact attached. The court said the admission had been judicially made by giving a bond which contained a description of the property attached, and, therefore, the intervenor was concluded by his admission and estopped from denying its truth.

In *Shaw v. McCullough* (3 West Va. 260), the court said that parties voluntarily entering into a forthcoming bond, are estopped from all inquiry into the regularity or validity of the levy of the writ of *feri facias* upon which the bond was taken. The bond recited the fact that the writ had issued and the property had been levied on, under it, and that was conclusive.

In *Schnaider Brewing Co. v. Niederweisser* (28 Mo. App. 233, 236), the defendant offered to show that certain of the property mentioned in the requisition and recited in the bond as having been taken under it, was in fact at the time that the bond was given, and ever since had been in plaintiff's possession. The evidence was excluded and the court held such exclusion to be right, because the respondents should not be permitted to contradict by oral testimony their own recitals in the bond given by them.

In *Carpenter v. Stearns* (32 Mo. App. 132), the court said that the defendants, having availed themselves of the benefits of the statute, which allows them to keep the property on giving a bond, are estopped from showing or

Opinion of the Court, per PECKHAM, J.

claiming on the trial that the property described in their delivery bond was never in their possession.

In *Hundley v. Filbert* (73 Mo. 34), the obligors in a delivery bond were estopped by a recital therein from showing that there was no levy upon which the property was taken.

In *State ex rel. v. Williams* (77 Mo. 463), it was held that a recital in a bond is a solemn admission by the obligor of the truth of the fact recited, and where in an action against him the bond is pleaded in *hæc verba*, the effect is the same as if there were a formal plea of estoppel. The claim was made in the above case that there was no proof that a party named was ever appointed guardian. The consideration of the bond recited that "whereas the above Robert H. Williams is the lawful guardian," etc. The court said, "this recital is a solemn admission by the defendants of William's guardianship," and defendant was held estopped by such admission from questioning the fact.

The case of *Miller v. Moses* (56 Me. 128) contains nothing opposed to these views. There the plaintiff in the replevin suit, in order to get his requisition, gave a bond, and of course it was for all the property which he expected to replevy. He was beaten in the action, and the defendant in that action thereupon sued on the bond to recover damages for taking his property. It was held in the latter action that the recital in the bond as to the purpose for which it issued, and describing *all* the property claimed, did not estop the defendant in such latter action from showing as a fact that only a part of the property described therein had been subsequently taken by the sheriff. The court said in such case the bond constitutes no estoppel. It is ordinarily given before the goods are replevied. It is based upon the writ, and assumes that what is ordered to be replevied, will be. But if not found, they cannot be, and for those that are found, the bond will be security and for no more.

This is not our case. Upon the whole, both on principle and authority, we think the evidence was not admissible, and the referee was, therefore, right in refusing the defendant's offer to show the alleged fact.

Opinion of the Court, per PECKHAM, J.

We have looked at the other questions arising in this case, and which the defendant contends were sufficient to procure the reversal of the judgment by the General Term. We think there is no merit in any of them.

The General Term erred in granting a new trial, and its order should, therefore, be reversed and the judgment upon the report of the referee affirmed, with costs.

All concur, except ANDREWS, J., not voting.

Order reversed and judgment affirmed.

On a subsequent motion for re-argument, the following opinion was handed down :

PECKHAM, J. Several grounds for this motion are stated. Among them it is urged that the court overlooked the fact that defendant in his answer denied that he ever had possession of the property mentioned in the plaintiffs' complaint or in the affidavit accompanying the requisition, and that it also overlooked the fact that section 1704 of the Code gives a defendant a right to demand a return of the chattels replevied, whether they were mentioned in the affidavit accompanying the requisition or not. Neither fact was overlooked.

The denial in the defendant's answer is of a somewhat ambiguous nature, and whether it could be fairly construed as raising a question as to the identity of the goods taken by the coroner with those described in the requisition, or only a question of title to the chattels, assuming those described in the requisition to have been taken by the coroner, is not clear. But this court assumed it to have been the former. One reason for regarding the proposed evidence as inadmissible was that the defendant by virtue of his bond had demanded and received a return of the property, and it being from that time in his possession and under his entire control, he could at once sell or otherwise dispose of the property and thus effectually prevent any further efforts at identification on the part of the plaintiffs. The service of an answer containing such a denial several weeks after the return of the property to defendant, would plainly have no

Opinion of the Court, per PECKHAM, J.

effect so far as defendant's opportunity to dispose of the property before its service was concerned. This seemed so apparent that it was not thought important to notice that particular fact. It is true the same thing might be done by a defendant executing the bond without any such recital. In that event, however, the vigilance of the plaintiff would not have been set at rest. He would see that as there was no admission he must rely on his own efforts to prove the fact, and they would probably be at once and vigorously enlisted for that purpose.

The provisions of the Code (§ 1704) were also not overlooked. The fact that the defendant has under that section the right to a return of the property taken by the sheriff on giving a bond, etc., even though it be not the property described in the requisition, was noticed and its effect appreciated by us. If the property taken be not the property mentioned and described in the requisition, then there is neither necessity nor propriety in reciting in the bond that it is such property. Where such recital is made it is evidence that the defendant intends to litigate only the question of title, and not the question of the identity of the goods. Under such circumstances there is still greater reason why the plaintiff should rely on it, and why the defendant should be bound by it. He recovers the possession of the property by reason of the bond, and he therein asserts that it is the same property mentioned in the requisition. There is nothing in the opinion criticised which shows that the only remedy of the defendant in this case was to sue the sheriff or leave the property in his hands. The counsel has made a most earnest argument in his brief, founded upon the general merits of his claim. We are entirely unconvinced of the error of our decision and we do not share in the fear of the serious calamities that may follow our persistence in it. On the contrary, we think gross injustice may follow the adoption of the other rule, as we have attempted to point out.

Two cases have been cited in the brief of the learned counsel which he claims are conclusive upon the question in controversy and which were not cited on the argument, and upon them he

Opinion of the Court, per PECKHAM, J.

specially bases his application for a re-argument of this case. They are *Carpenter v. Buller* (8 M. & W. 209) and *Reed v. McCourt* (41 N. Y. 435).

The first was an action brought for a trespass alleged to have been committed upon a lot belonging to the plaintiff, and upon a trial before COLERIDGE, J., the defendant gave in evidence a deed made between the defendant and the plaintiff and one William Fanshawe, in which was claimed to be an admission by way of a recital, that the land in question belonged to the defendant. The deed was admitted in evidence, but it was contended by plaintiff's counsel that the recital, though so admissible was not conclusive, and he proposed to show that the admission was made under a misapprehension. The evidence as to the mistake was admitted and a verdict was found for the plaintiff. The defendant obtained a rule to show cause why the verdict should not be set aside on the ground that the recital was conclusive against the plaintiff, and after argument upon that order the judgment of the court was delivered by PARKE, B., and it was held that the admission was not conclusive and that the judgment was correctly given for plaintiff. It was held to be not conclusive because the action in question was not founded on the deed, but was wholly collateral to it, and, therefore, the party ought to be permitted to dispute the facts so admitted.

The case in the Forty-first New York is of the same nature, although an action of ejectment. The recitals in both cases were, as stated in each, wholly collateral to the action then on trial. They had no relation to it whatever, directly or indirectly. It was nothing more than the case of an admission in a matter in nowise connected with the action in which it was desired to use it as conclusive evidence. Upon no basis of common sense could it be done.

But in the case at bar it is entirely different. While, technically, the action is not upon the undertaking, yet still the undertaking was executed on the part of the defendant, pursuant to the Code, and as one of the steps in the conduct of this very action, and it was by reason of its execution and

Opinion of the Court, per PECKHAM, J.

delivery to the plaintiffs that the property which the coroner had taken was re-delivered to the defendant. He thus in this action, re-possesses himself of the property in dispute, because of this bond. It is not, therefore, wholly collateral to the action. It plays a most important part therein, and by reason of its execution, the plaintiffs herein were prevented from themselves obtaining possession of the property. How can it be said that under such circumstances the instrument is wholly collateral to the action upon trial? So far from being wholly collateral, it is intimately connected with, and is part of the steps necessarily and properly taken in the conduct of the action itself. The learned counsel for the respondent admits that if the action had been brought directly upon the undertaking, the evidence in question would not have been admissible. It seems to us that it is not necessary that the action should be distinctly and technically upon the undertaking itself, in order to rule out the evidence under the very cases cited. The action must not only be separate and distinct from one upon the bond, but the bond itself must be wholly collateral to the action, and, as I have said, it cannot be contended that the undertaking in this action is wholly collateral to it when it is a step in the action itself, taken by virtue of the law in regard to such cases, and when the defendant has acquired possession of the very property in dispute by reason of the bond.

The action of *Diossy v. Morgan* (74 N.Y. 11), with the decision in which the counsel finds no fault, was no more brought upon the undertaking than is this action, and the undertaking is no more collateral in this action than was the undertaking in that of *Diossy*. If the counsel be right in his claim that this action is not only not brought upon the undertaking, but the undertaking is wholly collateral to it, then the *Diossy* case was, in any event, wrongly decided. But the estoppel, in that case, was based entirely upon the recital in that undertaking. The opinion of Judge RAPALLO is plain upon that point, and upon that question the two cases cannot be distinguished.

Statement of case.

The other cases cited by the counsel are of the same nature as those already referred to.

The learned counsel says our decision holds that an unnecessary recital in a written instrument estops the party making it from denying its truth, not only in actions on the instrument, but in any case where the instrument may be invoked as evidence of the facts recited. Also, that a party to an action, discovering that his opponent, inadvertently, and in the most general terms, has admitted, in writing, a question in issue, may fold his hands and rely upon the admission as estopping his opponent from proving the contrary, however erroneous the admission may be. The decision which we have made in this case cannot be tortured into holding either of the two propositions advanced by the counsel. The facts which we have spoken of so often as almost to be wearisome are wholly ignored in these statements and the character of the action, as related to the instrument containing the recitals, is mistakenly described.

We see no reason for granting a re-argument and the motion is, therefore, denied, with \$10 costs.

All concur.

Motion denied.

ALFRED ROE as Executor, etc., Respondent, v. CAROLINA A. STRONG et al., Appellants.

In an action to recover damages for the erection, and to compel the removal, of a wharf and bridge alleged to have been unlawfully erected by defendants upon lands of plaintiffs, adjoining and under the waters of Setauket bay, in the town of Brookhaven, Long Island, plaintiffs claimed title to the land above high-water mark as descendants of F., one of the original proprietors of the town, to whom a lot including the upland adjoining the bay was allotted. It appeared that the structures in question extended above high-water mark in front of the F. lot. *Held*, that in the absence of any evidence of a reservation by the town of land above high-water mark, the presumption was that plaintiffs' title extended to that mark; and so far as said structures extended above it, they were entitled to have them removed.

119	316
182	82
119	316
137	592
119	316
143	527

Statement of case.

As to the lands under water plaintiffs claimed title under a deed from S. to B., executed in 1768, which purported to convey "a certain piece of salt thatch," the bounds of which as given included the *locus in quo*. It appeared that plaintiffs and their predecessors in title, so far back as the memory of living witnesses extended, exercised acts of ownership by cutting thatch, leasing the right to cut to others, and in one instance brought suit against an alleged trespasser. It also appeared that, prior to 1693, the town had conveyed to a private person the land under water in the bay up to the line of and excepting that portion included in the deed to B. *Held*, that the evidence justified the presumption of a grant of the soil, and so made out a *prima facie* title in the plaintiffs; and that, therefore, a dismissal of the complaint was error.

Roe v. Strong (107 N. Y. 350) distinguished and, as to the last point decided therein, questioned.

Reported on a former appeal, 107 N. Y. 350.

(Argued January 20, 1890; decided February 25, 1890.)

Appeal from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made June 28, 1889, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

This action was brought to recover damages for the erection of a wharf and bridge upon plaintiffs' property, and to compel their removal.

The complaint alleges that the original plaintiffs are owners of certain premises situate in Setauket, in the town of Brookhaven, Suffolk county, adjacent to and in front of an arm of Setauket harbor, and a navigable bay or arm of the sea, that defendants are owners of a parcel of land called Strong's neck, situate upon the opposite shore of said bay and which connects with the mainland, where plaintiffs' premises are situated, by a public highway around the shore, and which was the usual means of communication between Strong's neck and the village of Setauket. It also alleges that in July, 1879, the defendants wrongfully commenced, and at the time of bringing the action continued, the erection of a bridge from Strong's neck to the main land and over and across the bay; sunk piles in the land under water, and also on the plaintiffs' lands; that its south-western terminus was built, or was intended

Statement of case.

to be built, upon plaintiffs' lands, and that for such purpose defendants unlawfully entered upon their lands; that such bridge is the private property of defendants, and that the public have no property therein or title thereto; that defendants have unlawfully raised or changed the grade of plaintiffs' lands between such terminus and the highway, and in so doing have unlawfully entered upon their property; it also alleges that such structure is a barrier to the passage of vessels, and will prevent their passage beyond plaintiffs' premises, and that they will be compelled to stop in front and discharge their cargoes thereon; and that by the acts aforesaid defendants have incumbered and injured plaintiffs' lands, and that they have not nor can they thereafter have or enjoy the same in so large, ample or beneficial a manner as they otherwise might or would have enjoyed the same.

The answer admits the erection of the bridge; that the bridge and wharf are the defendants' property, but deny plaintiffs' title to the *locus in quo*.

Pending the action the original plaintiffs died and the action was revived and continued by their personal representatives and heirs-at-law.

The plaintiffs' claim of title to the premises in question was derived from two sources. To the land above and to high-water line, as descendants of Richard Floyd, one of the original proprietors of the town of Brookhaven. To the land below high-water mark, as grantees of Adeline Woodhull. It was shown that Floyd was, in 1668, one of the then town proprietors, and one of the persons to whom land was allotted by the first allotment made by the town. That he settled upon and occupied the land which was known as the Floyd homestead lot from the time of the settlement, and that he and his descendants continued in possession.

As to the title to the land between high and low-water mark, plaintiffs claimed title under a deed from Joseph Brewster to Andrew Seaton, dated June 21, 1768, the substance of which, so far as material, and the other material facts are set forth in the opinion.

Statement of case.

John J. Macklin for appellants. The views of the Court of Appeals, upon which the new trial was ordered, are inapplicable upon the present appeal. (*Roe v. Strong*, 107 N. Y. 351.) It is to be presumed that Brewster and the Woodhulls knew the true state of the title. (*Pitney v. Leonard*, 1 Paige, 464; *Brown v. Bowen*, 30 N. Y. 519.) The deed made by Brewster is to be construed in the light of the surrounding circumstances and the situation of the parties. (*Town of Southampton v. M. B. O. Co.*, 116 N. Y. 1; *Moore v. Jackson*, 4 W. R., 58, 67.) To justify the court in presuming a valid title or to supply defects in a title, it is only necessary that it should appear that the facts are such as could not, according to the ordinary course of human affairs, occur unless there was a transmutation of title to the party claiming it or that facts are shown which lead to the inference that the title must have had a rightful commencement. (Greenl. on Ev. §§ 46, 48; *Jackson v. McCall*, 10 John, 387, 391; Best on Presump. §§ 108, 109; Philips on Ev. [Cowen & Hills' Notes] 311, 477; *Ricard v. Williams*, 7 Wheat. 59, 109; *Blight v. Rochester*, Id. 535; *Fletcher v. Faller*, 120 U. S. 534; *Jackson v. Warford*, 7 Wend. 66.) The undisputed facts shown establish the presumption of a grant in fee. (De Jure Maris, chaps. 3, 4, 5, 6, 7; Hall on Sea Shores [2d ed.], 129-131; 1 Greenl. on Ev. §§ 45, 46, 48; 2 id. § 541; Best on Presump. § 111; *Calmody v. Rowe*, 6 C. B. 861.) These rules are applicable no matter what the species of property may be affected by the claim — whether upland or land subject to the flow of the tide, not admitting of such possession as would be the basis of a title by adverse possession. (*Palmer v. Hicks*, 6 Johns. 133; Gould on Water Courses, § 22.) The doctrine that the grant of an easement or a right to profits may be presumed from user, applies only to incorporeal hereditaments, and does not extend to land or corporeal property or a claim of title thereto. (3 Washb. on Real Prop. 51; Cowen & Hills' Notes, 311.) The facts show such an occupation of the premises as to afford a basis for a title by adverse possession. (*Ewing v. Burnet*, 11 Pet. 41; *Watkins v. Holman*, 16 id.

Opinion of the Court, per ANDREWS, J.

25; *West v. Lanier*, 9 Humph. 771, 776; *Clancy v. Handette*, 39 Me. 451.)

A. A. *Spear* for respondents. The court will not help plaintiff out by a "guess;" they must prove their case. (*Taylor v. City of Yonkers*, 105 N. Y. 209.) The burden of proof was upon plaintiff, and the facts required of them by this court, on the former appeal to sustain title to high-water mark adjacent to the homestead, have all been found against them on conflicting testimony. (*Davis v. Clark*, 87 N. Y. 623; *People v. T. A. S. Bank*, 98 id. 661; *Marx v. McGlynn*, 88 id. 357; *Hewlett v. Elmer*, 103 id. 156; *Hynes v. McDermott*, 91 id. 451; *Bassett v. Wheeler*, 84 id. 466; *Snyder v. Sherman*, 88 id. 656.)

ANDREWS, J. This case is here for the second time. On the former appeal we reversed the judgment in favor of the plaintiffs, rendered after a trial of the issues, for the reasons stated in the opinion then given. (107 N. Y. 350.)

The present appeal is from a judgment affirming a judgment entered upon a dismissal of the complaint at Special Term, at the conclusion of the plaintiffs' evidence, no evidence having been given on the part of the defendants. The sole questions upon the present appeal are whether the case as made by the plaintiffs, *prima facie* established, or tended to establish, that the Floyd Homestead lot was bounded on the east by high-water mark of Setauket harbor; and, *second*, whether the evidence now presented on the part of the plaintiffs justifies a presumption of a grant by the town or freeholders of Brookhaven, to Joseph Brewster or his ancestors, of the soil under water in front of the Floyd premises described in Brewster's deed to Andrew Seaton, dated June 21, 1768.

It is not questioned but that the plaintiffs have succeeded to whatever title was originally vested in Richard Floyd to the homestead lot, and to the title of Brewster to the land under water, embraced in his deed to Seaton, or to whatever right he had in the *locus*. It is also undisputed that the structure erected by Strong, the removal of which is the object of the

Opinion of the Court, per ANDREWS, J.

present action, extends several feet above high-water mark of the harbor, in front of the Floyd homestead lot, and also across the land under water described in the Seaton deed. It is not now a question whether, assuming title in the plaintiffs to the *locus* upon which the bridge is built, the defendants have acquired, notwithstanding, a right to maintain the bridge. Their title or right, if any, was not disclosed, and if the plaintiffs have title to the soil on which the bridge is built, presumptively the erection is an invasion of such title, and a trespass.

In respect to the boundary of the Floyd homestead lot on the east or harbor side, it was held on the former appeal that the evidence then presented rendered it doubtful whether the title of Richard Floyd, the owner of the homestead lot, antedated the Nicoll patent to the freeholders of Brookhaven, of 1666, and assuming that it did not, but was acquired subsequent to that patent, it was held that there was some evidence in the case, introduced by the defendants, tending to show that in the allotment of town lands under that patent, the cliff, and not high-water mark, was the boundary of the allotted lands on the water side, the town retaining a strip between the cliff and the shore for public use. As the case now stands there is no evidence of such reservation and no ground for a presumption that the lots laid out upon the water were not bounded by high-water mark, or that they extended only to the cliff. It was said in the opinion in the former case, speaking of the Floyd homestead lot: "The fifty acres is adjacent to the harbor, and, in the absence of evidence to the contrary, it cannot be supposed that the person from whom Richard Floyd derived title reserved a strip a few rods wide along the shore, thereby cutting him off from access to the water over his own land." Upon the evidence now appearing there is nothing to overcome the presumption that the Floyd lot was bounded on the east by the water, and, assuming that the water was the boundary, the bridge, so far as it extended above high-water mark, was upon the land of the plaintiffs, and they were entitled, upon the evidence now appearing, to have it removed.

The other question in the case, relating to the alleged title

Opinion of the Court, per ANDREWS, J.

of the plaintiffs to the land under water embraced in the Seaton deed, depends upon the evidence given on the former trial, supplemented by additional and, as it seems to us, important proof. The town of Brookhaven, under the colonial patents, acquired a proprietary interest in the soil of the bays and harbors within its limits. (107 N. Y. 358, and cases cited.) No grant in fact is shown to have been made by the town at any time to the land under water embraced in the Brewster deed of 1768. But the deed purported to convey to Seaton in fee, for the consideration of £40, "a certain piece of salt thatch," bounded on the east "by a straight line from Col. Smith's gate to Col. Floyd's point." The plaintiffs deduce title under this deed by regular chain, and show that they and their grantors, for a period running back as far as the memory of living witnesses, exercised acts of ownership by cutting the thatch, leasing the right to cut to others, and that in one instance a suit was brought against an alleged trespasser by the person claiming under the Seaton deed. Upon the former appeal it was thought that this evidence was insufficient to show the title to the soil in the plaintiffs, but was consistent with the grant of a privilege merely to Brewster and his grantees to take the thatch, and did not justify a presumption of a grant by the town of the soil. I wrote the opinion in that case, but feel compelled to say that, upon further consideration, I entertain much doubt as to the correctness of our former conclusion on that point. Whatever was done by Brewster and his successors in title ought, in accordance with general principles, to be referred to the exercise of a right, and not to usurpation, there being no proof that the acts were tortious, or that they were ever challenged by the town. The cutting of the thatch, and the leasing of the right to do so to others, were the only acts of ownership which, considering the nature and situation of the property, could be exercised, and, while not making out a technical adverse possession under the statute, may justify the presumption of a grant, and perhaps a grant of the soil, and not a right to take thatch merely. Lord HALE, in his treatise *De Jure Maris* (chaps. 3, 4, 5, 6, 7), after

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Opinion of the Court, per ANDREWS, J.

stating that the title to the shore between high and low-water mark is presumptively in the king, but that it may be in the subject, and parcel of the manor adjacent, instances as evidence sufficient to warrant the presumption of title from the crown, "constant and usual fetching gravel, seaweed and seasand between high and low-water mark, and licensing others to do so; enclosing and embanking against the sea, and enjoyment of what is so had," etc. (See also *Calmady v. Rowe*, 6 C. B. 861; Phillips Ev. [Cowen & H. notes, Note 311, p. 4]; Greenl. on Ev. [Red. ed.] §§ 46, 48.) The plaintiffs on the last trial put in evidence a patent from Gov. Fletcher to Col. William Smith, Chief Justice of the Province of New York, dated October 9, 1693, which recited the purchase by the grantee of large tracts of land on Long Island (Nassau), and among others of "all such thatch beds or creek thatches as lyes within the harbor (Setauket) in a direct lyne from ye marked tree by the gate to ye southermost poynt of ye said Little Neck called Floyd's Poynt, given by ye townesmen of Brookhaven to him, ye said Smith, as by their s^d deeds, relacon being thereunto had, may more fully appear," and which patent confirmed and ratified Smith's title. The plaintiffs also produced in evidence the town records of Brookhaven, containing an entry showing that, at a meeting of the trustees, freeholders and commonalty of the town on the 27th of November, 1693, the patent to Smith was read and approved, and a further entry that on election day, in May, 1694, Col. Smith caused the patent to be publicly read before the freeholders of this town, and that it was voted to approve the same. These facts and admissions tend to show that the town had conveyed to Smith the title to the land under water in Setauket harbor, adjoining the premises described in the Brewster deed. Both Smith's patent and Brewster's deed make the boundary between the respective premises a line running from Smith's gate to Floyd's point. The same line is recognized in a deed from Selah Strong, the ancestor of defendants, to Abram Woodhull, dated April 4, 1785, as bounding the premises formerly belonging to Smith.

Statement of case.

It now appears, therefore, that the town, as early as 1693, had conveyed most of the land under water in the harbor of Setauket to a private person. What remained was the small part included between the western boundary of the Smith patent, and the shore at high-water mark, and this was the part conveyed by Brewster to Seaton in 1768. It does not seem to be an unreasonable presumption, under the circumstances, that the title of Brewster also originated in a grant from the town.

Upon the case as now presented we are of the opinion that the plaintiffs made out a *prima facie* title to the *locus* upon which the bridge was erected, and that the court erred in dismissing the complaint.

The judgment should, therefore, be reversed and a new trial granted.

All concur.

Judgment reversed.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Respondent, v. SARAH E. SHIPMAN et al., Impleaded, etc.,
Appellants.

The provision of the Revised Statutes (1 R. S. 737, § 124), declaring that "every instrument executed by the grantee of a power, conveying an estate, or creating a charge which such grantee would have no other right to convey or create, unless by virtue of his power, shall be deemed a valid execution of the power, although such power be not recited or referred to therein," was not intended to change then existing rules; and whenever, in addition to the power, the grantee has an independent interest in the property, whether legal or equitable, the rule of the statute does not apply, and the instrument will not be deemed an execution of the power, but only a conveyance of the independent interest.

The will of S. devised his real estate to his wife as long as she should remain his widow, and upon her death or remarriage to their children. He made her executrix, and the will authorized her to make advances from the property, from time to time, in her discretion, to the children "for maintenance and support," and empowered her to mortgage, lease and dispose of such property for the purpose of carrying into effect the provisions of the will. The widow married and subsequently exe-

Statement of case.

cuted a mortgage on said real estate in her individual name to secure a loan. The mortgage contained no reference to the character of the mortgagor as executrix, or to the power to mortgage contained in the will. This mortgage was paid from the proceeds of a loan obtained from plaintiff upon a mortgage of the same property, executed by the widow individually and as executrix. In an action to foreclose the latter mortgage, it appeared that plaintiff had knowledge that the purpose of the mortgagor was to pay the prior loan with the money borrowed; such prior loan was procured for the benefit of the widow's second husband. *Held*, that upon the marriage of the widow the fee of the real estate vested in the children, subject to the execution of the power of sale and to the widow's right of dower; that the interest mortgaged must be restricted to the individual interest which the mortgagor had as doweress; that although her dower right while unassigned did not give her a legal estate in the land, it was a legal interest and constituted property capable in equity of being sold, transferred and mortgaged by her.

Martin v. Smith (46 N. Y. 571) distinguished.

Mutual Life Ins. Co. v. Shipman (50 Hun, 578) reversed.

(Argued January 20, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January 1889, which reversed a judgment in favor of defendant, entered upon a decision of the court on trial at an equity term.

This was an action for the foreclosure of a mortgage.

The facts are sufficiently stated in the opinion.

A. J. Abbott for appellant. The children of the testator took, under the will, an absolute fee in the real estate devised, subject, however, to a general power in trust in the executrix (which did not cease upon her remarriage) to mortgage the same, for the purpose of raising money to make advances to the children for their maintenance and support (108 N. Y. 24.) The bond and mortgage for \$1,500, given by Mrs. Campbell to the Rochester Savings Bank, were made by her in her individual name and capacity, and not as the donee of the power in trust, aforesaid. (Perry on Trusts, § 511; *Blagge v. Miles*, 1 Story, 426; *Blake v. Hawkins*, 8 Otto, 315; *White v. Hicks*, 43 Barb. 87; 33 N. Y. 383.) The sav-

Statement of case.

ings bank bond and mortgage cannot be construed as having been executed by Mrs. C., under and by virtue of her general power in trust. (1 R. S. 739, § 124; *Church v. Bull*, 2 Den. 430; *Lewis v. Smith*, 9 N. Y. 502; 4 Kent's Comm. 372; *Finch v. Finch*, 10 Ohio St. 501; *Lothrop v. Foster*, 51 Me. 367; Perry on Trusts, § 511; R. & L. Law Dict. "Interest;" Bouvier's Law Dict. "Charge;" 2 Pomeroy on Eq. Juris. 163, § 1188.) Mrs. Campbell, at the time the savings bank mortgage was executed, had not only an absolute consummate, vested interest in the property covered by the same, but she also had an interest, which she could avail herself of, by sale and conveyance, even though her dower had not, as yet, been formally admeasured and assigned to her. (1 Cruise's Dig. 130, sub. 31; *Steele v. Wade*, 30 Hun, 458; *Simar v. Canaday*, 53 N. Y. 304; *Moore v. Mayor, etc.*, 8 id. 110; *Doty v. Baker*, Id. 110; *Payne v. Becker*, 87 id. 157; Code Civ. Pro. § 191, sub. 3; Bouvier's Law Dict. "Assignment;" 3 R. S. [7th ed.] 2222, § 38; *C. C. Bank v. Risley*, 19 N. Y. 370; Code Civ. Pro. § 1877; *Potter v. Everitt*, 7 Ir. Eq. Cas. 152; *Strong v. Clem*, 12 Ind. 37; *Davis v. N. Y., L. E. & W. R. R. Co.*, 5 N. Y. S. R. 819; 3 Pom. Eq. Juris. § 1383; *Pope v. Mead*, 99 N. Y. 201; *Bostwick v. Beach*, 103 id. 414; *Jones v. Fleming*, 104 id. 418; *Finch v. Finch*, 10 Ohio St. 501; *Lothrop v. Foster*, 51 Me. 367; *Marvin v. Smith*, 46 N. Y. 571; *Aikman v. Harsell*, 98 id. 186; Code Civ. Pro. § 1910; 1 Pom. Eq. Juris. § 395.) The plaintiff had notice that the payment, by its agent, of the savings bank's bond and mortgage out of the proceeds of its loan would be a misappropriation of the fund. (Perry on Trusts, § 222; Hill on Trustees, 165; 2 Pom. Eq. Juris. 115, § 667; *Holden v. N. Y. & E. B. R.*, 72 N. Y. 286.) The plaintiff is not within the protection of the statute (3 R. S. [7th ed.] 2183, § 66), but the case is governed by the rule in equity before the statute. (Perry on Trusts, § 602; *Field v. Scheffelin*, 7 Johns, Ch. 160; *Pendleton v. Fay*, 2 Paige Ch. 202, 205; *Anderson v. Van Allen*, 12 Johns. 343; *Murray v. Ballou*, 1 Johns. Ch. 575; *Parker v. Connor*, 93 N. Y. 124; *Brush v. Ware*, 15

Opinion of the Court. per RUGER, Ch. J.

Pet. 94; Perry on Trusts, §§ 800, 814, 831; *Champlin v. Haight*, 10 Paige Ch. 282; 1 R. S. 730, § 66.) When the motive of a party, or witness, in performing a particular act, becomes material, he may himself testify in regard to it. (Abbott's Trial Brief, 93, 98.)

Albert H. Harris for respondent. Mrs. Campbell, at the time of executing the mortgage to the Rochester Savings Bank, had no interest in the land to which the mortgage could attach. (1 Cruise's Dig. chap. 4, § 1; *Scott v. Howard*, 3 Barb. 319; *Marvin v. Smith*, 46 N. Y. 571; *Ritchie v. Putnam*, 13 Wend., 524; *Aikman v. Harsell*, 98 N. Y. 186; *Tomkins v. Fonda*, 4 Paige, 448; *Jackson v. Aspell*, 20 Johns. 411; *Jackson v. Van Derheyden*, 17 id. 166; *Lawrence v. Miller*, 2 N. Y. 245, 254; *Moore v. The Mayor*, 8 id. 110; *Pennington v. Yell*, 52 Am. Dig. 262, 274; *Yates v. Paddock*, 10 Wend. 528; *Strong v. Bragg*, 7 Blackf. 62; *Foster v. Gordon*, 5 Pick. 185; 2 Scribner on Dower, 42; 4 Kent's Comm. § 61.) The mortgage to the Rochester Savings Bank was executed under the power given to his executrix by Parson G. Shipman's will. (1 R. S. 737, § 124; Laws of 1875, chap. 371, § 26.)

RUGER, Ch. J. Parson G. Shipman died January 18, 1871, leaving him surviving Elizabeth L. Shipman, his widow, and seven children, and owning real estate, which he devised to his wife so long as she should remain his widow, and upon her death or marriage to the children born to him by her. The widow was made executrix of the will, and was authorized to make advances from the property, in her discretion, from time to time, to his several children "for maintenance and support," and was empowered to mortgage, lease and dispose of such property for the purpose of carrying into effect the provisions of the will. In June, 1876, before disposing of the real estate, the widow married one Campbell, and was his wife at the time of the execution of the mortgages giving rise to this controversy. In April, 1877, the widow executed a mortgage to

Opinion of the Court, per RUGER, Ch. J.

the Rochester Savings Bank on said real estate in her individual name, to secure the repayment to the mortgagee of a loan of money. The mortgage contained no reference to the character of the mortgagor, as executrix, or to the power to mortgage contained in the will; but appeared, on its face, to be the individual obligation of the widow. This mortgage was paid from the proceeds of a subsequent loan obtained from the plaintiff upon a mortgage of the same property, executed by her individually and as executrix, and the question in this case is whether the plaintiff, having knowledge of the purpose of the borrower to pay the prior loan with the moneys borrowed, had notice that such moneys were not to be used for the purposes of the will; the accomplishment of such purposes being the only authority under which she was, by the will, authorized to mortgage such real estate.

It is not disputed but that the widow upon the death of her husband became entitled to a right of dower in the real estate, and upon her marriage with Campbell, in 1876, the fee of the real estate vested in the children, subject to the execution of the power, and also subject to the right of dower. It was also established by the proof that both mortgage loans were, in fact, made for the benefit of Campbell, the widow's second husband, and not for any purpose of the will. The question in the case is, therefore, whether the interest attempted to be transferred by the first mortgage is ascribable to the power conferred by the will to mortgage the whole estate, or must be restricted to the individual interest which the mortgagor concededly had as doweress in such lands. In the absence of the provision contained in the chapter of the Revised Statutes relating to powers, there could, we think, be but little doubt that it would be held to convey only such interest as the mortgagor possessed in her individual right. It is said by Perry, in his work on Trusts (§ 511), that "if the donee of a power to sell land has also an interest in his own right in the same land, his deed of the land, making no reference to the power, will convey only his own interest, for there is a subject-matter for the deed to operate upon, excluding his power." Sugden

Opinion of the Court, per RUGER, Ch. J.

on Powers (3 Am. ed. p. 477) states the rule: "The doctrine settled by the decisions seems to be this: when the donee of a power to sell land possesses also *an interest* in the subject of the power, a conveyance by him without actual reference to the power, will not be deemed an execution of it, except there be evidence of an intention to execute it or at least in the face of evidence disproving such intent." Kent's Commentaries (vol. 4, p. 371 [11th ed.]) says: "The general rule of construction, both as to deeds and wills, is that if there be an interest and a power existing together in the same person over the same subject, and an act be done without a particular reference to the power, it will be applied to the interest and not to the power. If there be any legal interest on which the deed can attach, it will not execute a power."

The rule of construction laid down in these authorities seems to have been established long before the enactment of our Revised Statutes, and was in the immediate contemplation of the revisors when they framed section 124 of article 3, title 2, chapter 1 of part 2, reading as follows: "Every instrument executed by the grantee of a power, conveying an estate or *creating a charge*, which such grantee would have no other right to convey or create, unless by virtue of his power, shall be deemed a valid execution of the power, although such power be not recited or referred to therein." This section is couched in broad and liberal language, and seems to have been adopted for the purpose of combining, in the statutory regulations regarding powers, all such existing rules in respect to the subject as it was thought desirable and necessary to adopt and enforce in this country. There is no reason for supposing that the law makers intended to change the existing rule and adopt one which should create a marked and essential difference in the law, from what it had been for a long period of time in the country from whose jurisprudence our statutes in relation to powers were mainly derived. The rule was founded in reason and good sense, and was intended to provide that whenever a single power exists, under which a grantor may convey or mortgage real estate, his conveyance is attributable to the exer-

Opinion of the Court, per RUGER, Ch. J.

cise of the power actually possessed by him; but that whenever, in addition to a power, he is also invested with other independent interests or powers, whether legal or equitable, with respect to the same property, under the authority of either of which he may lawfully act, the rule of the statute should not apply.

There can be, we think, no question but that the mortgagor in this case came within the meaning and spirit of this rule, as a person having independent rights and interest in the property mortgaged, in addition to the testamentary power. Aside from the power, she had possession of the land under a consummate right of dower, of which she could enforce admeasurement. Although this right, while unassigned did not give her a legal estate in the land, it is now well settled that it was a legal interest and constituted property which was capable in equity of being sold, transferred and mortgaged by the doweress, and liable to be reached by creditors in payment of her debts. (*Tompkins v. Fonda*, 4 Paige, 448; *Simar v. Canaday*, 53 N. Y. 298; *Payne v. Becker*, 87 id. 153; *Pope v. Mead*, 99 id. 201; *Bostwick v. Beach*, 103 id. 414.) Judge FOLGER, in *Simar v. Canaday*, said: "We think it must be considered as settled in this state, notwithstanding *Moore v. Mayor, etc.*, and some dicta in other cases, that as between a wife and any other than the state, or its delegates or its agents exercising the right of eminent domain, an inchoate right of dower in lands is a subsisting and valuable interest which will be protected and preserved to her, and that she has a right of action to that end." Judge DANFORTH, in *Payne v. Becker*, says: "Both upon principle and authority, therefore, we must hold that the widow's right or claim of dower is property, and that, like any other species of property, it may be reached and applied to the payment of her debts." Judge RAPALLO, in *Bostwick v. Beach*, says: "The point made on the part of the defendant, that she could not dispose of her dower before it was admeasured, is decided adversely to her in the case of *Payne v. Becker*." In *Pope v. Mead* it is said, that a dower right, although not admeasured, is an absolute right, which is assignable.

Opinion of the Court, per RUGER, Ch. J.

That dower, before assignment, is an interest in lands within the meaning of the Statute of Frauds, is held in *Finch v. Finch* (10 Ohio St. 501), *Lothrop v. Foster* (51 Maine, 367), and is fairly implied in *Tompkins v. Fonda* and *Payne v. Becker* (*supra*). It has been held that a release of an inchoate right of dower constitutes a good consideration for a promise to pay (*Garlick v. Strong*, 3 Paige, 440), and that the existence of an inchoate right of dower in the equity of redemption of mortgaged premises, constitutes a good objection to title by a vendee in an action against him for specific performance (*Mills v. Van Voorhies*, 20 N. Y. 412). Judge SELDEN, writing in that case upon the effect of an omission to make the wife of a mortgagor a party to a foreclosure suit, says: "Whether at common law it would be necessary to make her a party must depend upon the question whether she has any interest, either legal or equitable, complete or inchoate, in the mortgaged premises. If she had such an interest, however remote, then, upon the plainest and most familiar principles, that interest cannot be affected, unless by virtue of some statute, by a suit in equity to which she is not a party, * * * and a purchaser under such a foreclosure would not obtain an unincumbered title." Such a right, although a mere chose in action and constituting no legal estate in the land, is, nevertheless, one which cannot be enforced against any property, other than the land, and when enforced creates a legal estate therein paramount to the right of those holding the legal title. A mortgage of such an interest operates as a conditional transfer of the right to enforce admeasurement of dower, and enables the mortgagee to reduce to possession so much of the land as is necessary to satisfy the requirements of the mortgage.

Property capable of being sold, transferred and delivered, or charged, by means of legal proceedings, with the payment of debts, is, we think, such an interest as enables its owner, within the meaning of the statute, to create a charge thereon. (Bouvier's Law Dict. title "Charge;" Thomas on Mortgages, § 66.)

Opinion of the Court, per RUGER, Ch. J.

Although the right of a doweress in lands, before assignment, is not an estate, it is nevertheless a charge and incumbrance upon them, and is capable of being enforced and of producing a legal estate. It is, in that respect, similar to the right which a mortgagee has in the lands mortgaged. The interest of neither constitutes an estate in lands; but both are interests, which may be pledged, transferred or conveyed by any appropriate instrument evidencing an intent to so transfer them, and in neither case can the lands be effectually transferred by the legal owners, so as to free them in the hands of any subsequent grantees from the respective claims of the doweress, or mortgagee, or their assignees. The real question under the statute would seem to be whether the mortgagee had a transferable interest in the mortgaged premises; one which would be available in the hands of her transferee as security for a debt. If so, then her interest was sufficient to bring her within the reason and meaning of the statute. A consideration of the object and purposes of a statute affords the safest and most reliable guide for the ascertainment of its intent and of the meaning and effect which should be ascribed to it.

In the statute referred to, the revisors, obviously, did not attempt to create or define estates in lands, but merely prescribed a rule of construction for the interpretation of conveyances affecting real estate, which might be executed under the authority of a power.

It is quite obvious that an interest possessed by a grantor in real estate, whether legal or equitable, that is effectual to create a transfer of property, is equally persuasive as any other in furnishing a motive or reason for making or receiving a particular conveyance, and would furnish an equally strong circumstance from which the imputation of a legal intent might be derived. Both equitable and legal interests in real estate are valuable and capable of transfer and are equally effective in determining the intent with which a particular conveyance is made.

The widow having, therefore, an interest in the land at the time of the execution of the first mortgage, capable of being

Opinion of the Court, per RUGER, Ch. J.

sold, transferred and mortgaged, aside from the right to sell or mortgage under the power, her mortgage is not affected by the statute referred to. The contention, that an unassigned right of dower consummate is not transferable, comes with curious effect from a party presenting a record which shows a decree in its favor under a mortgage authorizing a sale of this dower right for the satisfaction of its debt.

The case of *Marvin v. Smith* (46 N. Y. 571), cited to show the non-assignability of a right of dower, in the court below, hardly supports the proposition. That case holds only that the wife's inchoate right of dower "is incapable of being transferred or released by her during coverture, except to one who already had, or who by the same instrument received an independent interest in the estate, nor could she bind herself, personally, by a covenant or contract affecting her dower right."

This case proceeded upon the disabilities attaching to the state of coverture and did not affect the right of a widow to contract, with reference to, or convey a consummate right of dower.

Cases relating to the question of proper parties to actions upon assigned choses in action, prior to the adoption of the Code requiring them to be brought in the name of the real party in interest, have no bearing upon the questions here presented, and need not be further considered.

The order of the General Term should be reversed and the judgment of the Special Term affirmed, with costs in the General Term and this court against the plaintiff.

All concur, except EARL, J., not voting and PECKHAM, J., not sitting

Order reversed and judgment affirmed.

Statement of case.

ABEL A. CROSBY et al., Appellants, v. THE PRESIDENT, ETC., OF
THE DELAWARE AND HUDSON CANAL COMPANY, Respondent.

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In an action to recover damages for the alleged conversion of a quantity of lumber, which had been transferred to plaintiff by the firm of G. & E. H., it appeared that said firm, having contracted to build two boats for defendant, ordered lumber of it; the order specified kinds and quantities, but no prices; the lumber was forthwith delivered, accompanied by a bill, in which the firm was described as debtors to defendant for the lumber, and the quantity, kind and price were set forth. Defendant was not required by the contract to furnish any lumber, nor were the contractors required to purchase any from it. It did not appear there were any negotiations between the parties prior to the delivery of the lumber as to the terms and conditions on which the lumber was to be furnished. Defendant proved that it kept on hand lumber for building boats, including pieces specially shaped, which it used for that purpose, and also furnished to builders having contracts with it, but only to be used in boats built for it, and that the value of the lumber so furnished was deducted from the price of the boat in which it was used, which custom was known to G. & E. H. At the close of the evidence a motion by defendant's counsel for a nonsuit was granted. *Held*, error; that the question whether there was a bailment or a sale was for the jury.

(Argued January 20, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 16, 1889, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at circuit.

This action was brought to recover damages for the conversion of a quantity of lumber which had been transferred to plaintiffs by the firm of George & Edward Harnden, in payment of a debt of which defendant claimed to be the owner.

The material facts are sufficiently stated in the opinion.

S. L. Stebbins for appellant. If, in any view of the evidence, taken in its most favorable light, a verdict may be rendered for the plaintiff, or if there are questions of fact which may be determined for the plaintiff, and, if determined in his favor, will entitle him to recover, the case should not

Statement of case.

be taken from the jury by a nonsuit. (Baylies' Trial Practice, 219; *Clemence v. City of Auburn*, 66 N. Y. 334, 338; *Thompson v. Lumley*, 50 How. Pr. 105; *Carl v. Ayres*, 53 N. Y. 14; *Bickett v. Taylor*, 55 How. Pr. 126; *Colt v. S. A. R. R. Co.*, 49 N. Y. 671; *Heyne v. Blair*, 62 id. 19; *Freund v. I. & T. N. Bank*, 3 Hun, 689, 690; *Morss v. Osborn*, 64 Barb. 543.) Where a party is nonsuited upon the motion of his adversary, over his objection and exception, he may insist upon a review of the decision, not only that the trial judge erred in the application of the law to the facts as viewed by him, but that he erred in his conclusion of fact, or that there were disputed questions of fact which should have been submitted to the jury; and if the appellate court determine that the appellant is right in this contention, it will reverse the judgment and order a new trial although the appellant did not request that the whole case or any specific question of fact therein be submitted to the jury. (Baylies on N. T. & App. 185; *Clemence v. City of Auburn*, 66 N. Y. 334, 338; *Stone v. Flower*, 47 id. 566; *Frecking v. Rolland*, 53 id. 422, 424; *Train v. H. P. Ins. Co.*, 62 id. 598, 604; *Trustees, etc., v. Kirk*, 68 id. 459, 464.) The plaintiffs did not, by moving the court to direct a verdict in their favor, waive their right to ask to go to the jury. (Baylies on N. T. & App. 186; *Koehler v. Adler*, 78 N. Y. 287, 290.) The trial judge erred in nonsuiting the plaintiffs, and unless he should have directed a verdict in their favor, the case should have been submitted to the jury. (*Powell v. Powell*, 71 N. Y. 71, 73; *Hart v. H. R. B. Co.*, 80 id. 622; *Justice v. Lang*, 52 id. 323; *Buffum v. Merry*, 3 Mason, 478.) The plaintiffs were entitled to recover some amount of damages, even if the defendant had title to the lumber and a right to its possession. *Stevens v. Hyde*, 32 Barb. 171, 181; *Esmay v. Fanning*, 9 id. 176, 189, 190; *Ryerson v. Kauffield*, 13 Hun, 387, 388; *Sluyter v. Williams*, 37 How. Pr. 109; *Powers v. Bassford*, 19 id. 309; *White v. Brown*, 5 Lans. 78; *Rawley v. Brown*, 18 Hun, 456, 457; *Bliss v. Cottle*, 32 Barb. 322; *White v. Dods*, 42 id. 554, 562, 565; *Lacker v. Rhoades*, 45 id. 499; *Howell v.*

Statement of case.

Kroose, 2 Abb. Pr. 167; *Fuller v. Lewis*, 13 How. Pr. 219; *Talcott v. Belding*, 46 id. 419, 421, 422; *Van Rensselaer v. Jewett*, 2 N. Y. 135; *People v. M. T. & T. Co.*, 64 How. Pr. 120, 126, 127; *Weber v. Kingsland*, 8 Bosw. 415, 425.) The trial judge erred in refusing to strike out the testimony of Larter, that he sent the bill for the lumber to the Harndens so as to give them information of what lumber had been sent. (*Taft v. Dickinson*, 6 Allen, 553.) The plaintiffs' motion to the court to direct a verdict in their favor should have been granted. (*Bigelow v. Legg*, 102 N. Y. 652, 654.)

F. S. Westbrook for respondent. Parol evidence was admissible, to show that the bill was not sent as a contract of sale, nor as a memorandum of the antecedent parol agreement, but merely as information to the Harndens for how much they must account for the lumber sent them to be used in building the boats. (Benjamin on Sales, § 209; *Eighmie v. Taylor*, 98 N. Y. 296, 297; *Briggs v. Hilton*, 99 id. 526; *Grierson v. Mason*, 60 id. 394; *U. T. Co. v. Whiton*, 97 id. 178; *McMaster v. Ins. Co.*, 55 id. 228; *Plough v. Dairs*, 96 U. S. 336; *Brick v. Brick*, 98 id. 516; *Hazard v. Loring*, 10 Cush. 267; *Quin v. Lloyd*, 41 N. Y. 349, 355; *People v. Chacon*, 102 id. 671.) It is evident that the bill was sent for the reason only that the Harndens would want, and were entitled to know, what lumber had been sent to them, whether it was a sale or a bailment. (*Downey v. Rowell*, 22 Vt. 347; *Foster v. Pettibone*, 7 N. Y. 431, 437; *Dwight v. Ins. Co.*, 103 id. 352, 353, 358, 359; *Cagger v. Lansing*, 64 id. 427.) The Harndens did not retain the possession of the property for the purpose for which they received it, but wrongfully parted with that possession by an attempted sale, and thus subjected themselves to an action of conversion without a previous demand. (*Esmay v. Fanning*, 9 Barb. 190; *Spencer v. McGinn*, 13 Wend. 256; *Manning v. Keenan*, 73 N. Y. 59; *Scribner v. Beach*, 4 Denio, 451; *Boyce v. Brockway*, 81 N. Y. 490, 493; *Pease v. Smith*, 61 id. 480.)

Opinion of the Court, per ANDREWS, J.

ANDREWS, J. The transaction between the defendant and the Harndens was either a bailment of the lumber or a sale. Regarding it as a bailment, it was a bailment to be transmuted into a sale when the Harndens should use the lumber in building the boats, and thereby incorporate it with other lumber and materials required in their construction. It was not contemplated that the title to the boats should vest in the defendant until completion and acceptance. The consent of the defendant that the Harndens might use the lumber in the construction of the boats must be conceded. The bailment would necessarily terminate and the title to the lumber would, by operation of law, vest in the Harndens, when it became, by the consent of the defendant, mingled with the lumber and materials of the Harndens in the process of constructing the boats. If, after the boats had been constructed, the Harndens had refused to perform their contract, or to deliver the boats to the defendant, the latter could not have asserted title to them on the ground that the lumber furnished by the company went into their construction. The Harndens would, in the case supposed, be liable for the value of the lumber as upon a purchase and sale, and possibly the defendant might enforce a lien on the boats to the extent of such value in view of the circumstances.

There was no objection in law to an arrangement between the defendant and the Harndens, that until the lumber was actually used for the purpose intended the title should remain in the defendant. The point is whether the evidence conclusively establishes this to have been the arrangement, or could the jury have been permitted, if the case had been submitted to them, to find that the transaction at the outset was a sale to the Harndens.

The contract for the boats was made November 8, 1882, by the acceptance by the Harndens of a written proposition of the defendant, that if they would build two boats during the following winter for delivery in the spring, "the company will take them at twelve hundred dollars (\$1,200), subject to inspection and approval by the company inspector." The

Opinion of the Court, per ANDREWS, J.

lumber in question was ordered by the Harndens of the defendant's agent November 21, 1882, and was delivered on or about the twenty-fourth. The contract for building the boats did not require the defendant to furnish any of the lumber, nor did it require the Harndens to procure any from the defendant. The order for the lumber specified kinds and quantities, but no prices. The defendant's agent, on forwarding the lumber, sent a bill for the lumber, commencing "Messrs. G. & E. Harndens, To The Delaware & Hudson Canal Co., Dr.," and this is followed by a specification of the quantity, kind and price of each description of lumber sent, the prices aggregating \$412.77. The bill was partly written and partly printed, the ordinary billhead of the company being used, and the words "To The Delaware & Hudson Canal Co., Dr.," were printed. It does not appear that there were any negotiations between the parties prior to the delivery of the lumber as to the terms and conditions on which it was to be furnished. The defendant, however, gave evidence showing that it kept on hand pine lumber for building boats, including pieces specially shaped, which it used in building boats at its own yards, and also furnished to boat builders having contracts to build boats for the defendant, but it was furnished to third persons only for the purpose of having the same used in such boats, and that the value of the lumber furnished was deducted from the price of the boat, and that this custom was known to the Harndens. The bill of items is some evidence that the transaction was understood as a sale, although not conclusive. Whether a sale or a bailment, in either case, the sum to be charged for the lumber was a matter in which both the Harndens and the company were interested. The custom of the defendant to supply lumber only for use in its boats, and to take the value out of the price of the boat, does not seem necessarily inconsistent with a sale. The Harndens testified that formerly they paid cash on delivery of lumber furnished by the defendant for boats which they built for the company, and that later the custom was to deduct the value of lumber so furnished from the price to be paid for the boat when com-

Statement of case.

pleted on delivery. It is insisted by the counsel for the plaintiffs that the jury might have found that the change made was from cash to credit sales, the credit extending to the time when, by the contract, the boat was to be completed. We think it would not be useful to go further into the details of the evidence. There seems to be but little equity in the claim of the plaintiffs to have the lumber applied on their debt. But we think the question whether there was a bailment or a sale was for the jury.

The judgment should, therefore, be reversed and a new trial ordered.

All concur except PECKHAM, J., not sitting.

Judgment reversed.

THE BOARD OF SUPERVISORS OF ERIE COUNTY, Respondent,
v. HENRY R. JONES, Appellant.

Under and by the provision of the act of 1881 (Chap. 557, Laws of 1881), declaring that every county treasurer thereafter elected or appointed in the county of Erie, "shall receive, as compensation for his services," an annual salary to be fixed before he enters upon the duties of his office, the six months' limitation of the act of 1877 (Chap. 436, Laws of 1877) became inapplicable, and it became lawful for the board of supervisors to fix the next treasurer's salary at any time before his election, and the salary, so fixed, is the only compensation he is entitled to for the entire and complete performance of all his official duties.

Accordingly, *held*, that defendant, who was elected county treasurer at the November election in said county, following the passage of said act of 1881, the board of supervisors having previously fixed his salary, was only entitled to the salary so fixed; and he having withheld the fees collected by him and refused to pay the same over to the county, which, under the act of 1880 (Chap. 233, Laws of 1880) was entitled to them, that an action was maintainable against him, on behalf of the county, by its board of supervisors, to recover the same.

(Argued January 21, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1888, which affirmed a judg-

Statement of case.

ment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

This action was brought to recover the sum of \$9,626.84, claimed to have been retained by defendant, wrongfully and unlawfully, while in the discharge of the duties of the office of treasurer of the county of Erie, during the years 1882 and 1883.

The facts are sufficiently stated in the opinion.

George J. Sicard for appellant. The county treasurer of Erie county was entitled by law to receive and retain for his own use several classes of fees and commissions mentioned in the plaintiff's complaint. (Laws of 1877, chap. 436, § 5; Laws of 1880, chaps. 223, 580; Laws of 1881, chap. 441; *Ely v. Holton*, 15 N. Y. 595; *People v. Hartung*, 26 id. 172; *Moore v. Massert*, 49 id. 332.) There is no interdiction, either in terms or by reasonable implication, of the treasurer's right to receive as his own the "fees, commissions and percentages," which, as it is conceded, constituted the compensation of the county treasurer before the statute of 1877 was enacted. (Laws of 1846, chap. 189; Laws of 1859, chap. 164; *Dwarris on Statutes*, 532; *Sedgwick on Stat. Cons.* 98.) Assuming that the court should agree with our contention that, by force of chapter 580 of the Laws of 1880, the county of Erie was not within the operation of the statute of 1877, as amended by chapter 233, of 1880, it results that defendant had a perfect right to retain in his hands, as against the county, the fees and commissions for "paying over to the comptroller the moneys received by defendant as treasurer as aforesaid, and being the state taxes due from the county of Erie." (*Board of Super. v. Otis*, 62 N. Y. 88; 2 R. S. [8th ed.] 1048, § 18; *Dewey v. Supervisors*, 62 N. Y. 294.) The defendant had a right to retain in his hands those commissions and fees referred to in the second item of plaintiff's demand, viz.: \$2,047.69 for receiving and paying out moneys deposited upon court orders in infant's proceedings and analogous cases. (Laws of 1849, chap. 357; *Code Civ. Pro.* § 3321.)

Opinion of the Court, per FINCH, J.

Chas. F. Tabor, for respondent. The statute of 1877 and the amendment of 1880, was, at the time when the defendant was elected county treasurer, November, 1881, in force and operation in the county of Erie. (Laws of 1846, chap. 189; Laws of 1863, chap. 393, § 5; Laws of 1871, chap. 110; Laws of 1855, chap. 340, § 1; Laws of 1859, chap. 162, §§ 11, 12; Laws of 1877, chap. 436; Laws of 1880, chap. 233, 580; Laws of 1881, chap. 557.) The act of 1877 repealed all other acts, special or otherwise, relating to the compensation of county treasurers in this state outside of the counties of Seneca and Monroe. (*People ex rel. v. Bd. of Supervisors*, 73 N. Y. 173; *Bd. of Supervisors v. Allen*, 99 id. 532; *People v. Jaehne*, 103 id. 194.) The legislature in 1881 intended, by chapter 411 of the Laws of that year, to restore Erie county to the provisions of the act of 1877. (*Smith v. People*, 47 N. Y. 339; 70 id. 236; *People ex rel. v. Lacombe*, 99 id. 53; 43 id. 132; *People ex rel. v. D'Oench*, 44 Hun, 41; 115 id. 210; *Board of Supervisors v. Allen*, 99 N. Y. 537.) The legislature had the power at any time to regulate and fix the salary of a county treasurer. (*Connor v. Mayor, etc.*, 5 N. Y. 285; *Long v. Mayor, etc.*, 81 id. 425; *Mangam v. City of Brooklyn*, 98 id. 585.) Chapter 557 of the Laws of 1881, standing alone and without the aid of the act of 1877, is sufficient for all the purposes of this case and to sustain the judgment herein. (*Baker v. City of Utica*, 19 N. Y. 326; *O'Gormon v. Mayor, etc.*, 67 id. 486; *In re N. Y. C. & H. R. R. Co.* 7 Abb. [N. C.] 408; Code Civ. Pro. §§ 3280, 3330.)

FINCH, J. The current of legislation intended to change the compensation of county treasurers began with the act of 1877 (Chap. 436). It found those officers, under the operation of existing laws, receiving for their services fees and commissions charged upon the taxpayers or payable out of the fund. The compensation thus obtained was very unequal in the different counties, and in many of them largely in excess of the real value of the services rendered. To remedy this defect the act of 1877 was passed, which changed the

Opinion of the Court, per FINCH, J.

compensation from fees and commissions to an annual salary to be fixed by the board of supervisors at least six months before the officer's election, and which should not be increased or diminished during his term of office. (§ 5.) What was meant by the expression "as compensation", was put beyond any doubt or question by a negative provision, that he should "not receive to his use any interest, fees, or other compensation for his services except in proceedings for the sale of lands for unpaid taxes." The phrase "as compensation for his services," therefore, meant full and complete and entire compensation for all services beyond those specifically excepted. Two counties, Monroe and Seneca, by section 10, were withdrawn from the operation of the act. In 1880 (chap. 233) an amendment was passed further indicating the legislative intent. It provided that the fees and commissions allowed by law before the act of 1877 might still be collected by the county treasurer, but for the use of the county which paid him his salary and not for his own use and benefit. Whatever he received from such services was to go to the county, and his entire compensation come from the county in the form of an annual salary. In that same year (chap. 580) a long list of counties was added to the two originally exempted from the operation of the act, and among these was the county of Erie. Apparently that exemption produced dissatisfaction, for in 1881 (chap. 441), the section which granted the exemption was amended by striking out the county of Erie, with an obvious intent to leave it under the operation of the act of 1877 as it was before by the amendment of 1880, its exemption had been secured. Very likely these changes were the outcome of a struggle between the officials and the taxpayers, in which first one and then the other prevailed. But the act of 1881 had two defects. By its terms it was to take effect January 1, 1882, and it made no provision for an emergency which was approaching. A new treasurer was to be elected in November of 1881, and six months did not remain preceding that election, so that the salary of the new official could be fixed the requisite length of time before his election, as provided by

Opinion of the Court, per FINCH, J.

the act of 1877; and the amendment of 1881, not becoming effective until after the election of that year, might not apply to the new officer and so postpone the legislative purpose until the end of his term. To remedy these defects chapter 557 of the laws of 1881 was passed. It was enacted at the same session of the legislature which restored Erie to the list of counties whose treasurers were made salaried officers, and within about a month later than the previous act. It became a law in June, taking effect immediately. It provided that, "Every county treasurer hereafter elected or appointed in the county of Erie shall receive as compensation for his services an annual salary of not less than five thousand dollars, to be fixed by the board of supervisors before he shall enter upon the duties of his office;" and its second section added: "This act shall take effect immediately." By these provisions the six months limitation of the act of 1877 was made inapplicable, and it became lawful for the board of supervisors to fix the next treasurer's salary at any time before his election. The further difficulty in the act of 1881, arising from the postponement of its effective operation to the first day of the next year, was also obviated by making the last act take effect at once.

At the November election following the passage of this act the defendant was chosen county treasurer, the board of supervisors having previously fixed his salary. Notwithstanding, he has withheld the fees collected by him, claiming that they are rightfully his and refusing to pay them over to the county. Judgment for their amount has gone against him, which has been affirmed by the General Term.

The chief ground of his contention is that the act of June, 1881, does not in express terms forbid the receipt of fees by the county treasurer or repeal by implication the laws under which, before 1877, the county treasurers were entitled to receive them. But I think that is a very narrow interpretation and more nice than wise. If the statute of June, 1881, stood alone it would, by the force of its own terms, substitute an annual salary for fees. When it declares that the county treasurer shall receive, "as compensation for his services," an

Statement of case.

annual salary, it very plainly implies that such salary is to be his sole and only reward. "For his services" means for all his services, for the entire and complete performance of his official duties, and a specific compensation awarded for those services implies the full and entire compensation to which he is entitled. But this natural interpretation of the language becomes conclusive when the statute is read in connection with the legislation on the same subject. The act of 1877 defined the phrase "as compensation for his services" so fully and explicitly as to leave no possible room for doubt. The later legislation on the same subject repeats the phrase, which must retain the meaning attached and not bear a new and different one. The inference from the statutes read together, and in the light of the evil they were intended to remedy, becomes irresistible.

The judgment was right, and should be affirmed with costs.

All concur.

Judgment affirmed.

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SARAH HILL, Appellant, v. THE BOARD OF SUPERVISORS OF
RENSSELAER COUNTY, Respondent.

In an action, under the act of 1855 (Chap. 428, Laws of 1855), to recover compensation for property destroyed in consequence of a mob or riot, it appeared that an action was begun in the County Court for the same cause within the three months limited by said act, in which the complaint was dismissed for want of jurisdiction in that court to entertain actions brought to recover a sum exceeding \$1,000; thereafter, this action was commenced, but after the lapse of the statutory period. *Held*, that the action was not maintainable; that as it was brought under special law and was maintainable solely by its authority, the limitation was so incorporated with the remedy given as to make it an integral part of it and was a condition precedent to the maintenance of the action at all; and that the provision of the Code of Civil Procedure (§ 405) providing that when an action is commenced within the time limited and is terminated "in any other manner than by voluntary discontinuance, dismissal for neglect to proceed, or a final judgment on the merits, the plaintiff may commence a new action for the same cause within one year after," such termination, did not apply. (See § 414.)

Reported below 53 Hun, 194.

(Argued January 21, 1890; decided February 25, 1890.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 6, 1889, which reversed a judgment in favor of plaintiff, entered upon the report of a referee and granted a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

James Lansing for appellant. The plaintiff's property was destroyed in consequence of a mob or riot, within chapter 428, Laws of 1855, providing for compensating, by the city or county where the injury occurred, the parties whose property may be destroyed in consequence of mobs or riots. (*People v. White*, 55 Barb. 606; 2 Arch. C. L. & Pl. 934; Barb. Cr. Law, 210; Roscoe's Crim. Ev. 829; *Solomon v. City of Kingston*, 24 Hun, 562; Penal Code, §§ 449, 450; *State v. Alexander*, 7 Rich. 5; *State v. Jones*, 1 Spear. 13; 2 B. & H. Comm. [Wait's ed.] 443.) The "destruction or injury of the property" of the plaintiff by the mob or riot "was not occasioned or in any manner aided, sanctioned, or permitted by the carelessness or negligence" of the plaintiff. (Laws of 1855, chap. 428, § 3; *Ely v. Super.*, 36 N. Y. 297; *Moody v. Super.*, 46 Barb. 659; *Blodgett v. City of Syracuse*, 36 id. 526; *Fabbri v. Kalbfleisch*, 52 N. Y. 28; *Burnap v. N. B.*, 96 id. 125; *Thomson v. Bank*, 82 id. 1; *Phelps v. McDonald*, 26 id. 82-84; *Smith v. Pettee*, 70 id. 13; *Everson v. City of Syracuse*, 100 id. 577; *Myers v. Lathrop*, 73 id. 315; *Grant v. Morse*, 22 id. 323; *Comstock v. Ames*, 3 Keyes, 357.) No defense covering the Civil Damage Act was set up in the answer. It is entirely new matter and should have been pleaded; it is not covered by the defense of general denial; it is, if available, a distinct affirmative defense. The Civil Damage Act is in contravention of the rules of the common law, and must, if applicable to the case, be pleaded like the Statute of Limitations and usury. (*Honegger v. Wettstein*, 94 N. Y. 252; *O'Toole v. Garvin*, 1 Hun, 92; *May v. Burras*, 13 Abb. [N. C.] 384; *Brazil v. Isham*, 12 N. Y. 1; *Paige v. Willett*, 38 id. 31;

Opinion of the Court, per GRAY, J.

Bertholf v. O'Reilly, 74 id. 513.) The Statute of Limitations is not an available defense in this case. (*Mills v. McCoy*, 4 Cow. 406; *Abb. Tr. Ev.* 654; *Watts v. Clegg*, 48 Ala. 561; 2 Greenl. on Ev. § 452; *Bristow v. Haywood*, 4 Cam. 213; *Brook v. Carpenter*, 3 Bing. 297; *Hope v. Acker*, 7 Abb. Pr. 308; *Crockett v. Smith*, 14 id. 62; *Coe v. Raymond*, 89 N. Y. 612; *Green v. N. Y. C. R. R. Co.*, 2 Civ. Pro. Rep. 428.)

R. A. Parmenter for respondent. The injury complained of did not occur "in consequence of a mob or riot" within the meaning of the act of 1855. (Bouvier's Law Dict. "Riot;" Hawkins' Cr. Pl. chap. 65, § 1; *Duryea v. Mayor, etc.*, 10 Daly, 300, 304.) The negligence and misconduct of the plaintiff's servants, in charge of the hotel, caused or contributed to the injury. (*Paladino v. Super.*, 47 Hun, 337; *Darlington v. Mayor, etc.*, 31 N. Y. 187; *Reynolds v. N. Y. C. & H. R. R. R. Co.*, 58 id. 248.) The plaintiff was not entitled to recover because the action was not brought within three months after the loss occurred. (Code Civ. Pro. § 340; *McIntyre v. Carriere*, 17 Hun, 64; *Jones v. Reed*, 1 Johns. Cas. 20; *Powers v. People*, 4 Johns. 290; *Turner v. Roby*, 3 N. Y. 193.) Section 405 of the Code of Civil Procedure has no application in this suit, and the time in which the plaintiff might bring her suit is not thereby extended. (*Hammond v. Shephard*, 30 Hun, 318.)

GRAY, J. This was an action brought to recover compensation from the defendants for the destruction of the plaintiff's property, in consequence of a mob or riot. As the only authority for maintaining such an action is contained in a special law, passed by the legislature in 1855 (chap. 428, Laws 1855), and the objection was taken and is now insisted upon that it was not commenced within the time limited therefor by the act, it is unnecessary to consider other questions, if that objection is sound. By the fifth section of the act it is provided that "no action shall be maintained, under the provisions of this act,

Opinion of the Court, per GRAY, J.

unless the same shall be brought within three months after the loss or injury."

It seems that an action was begun within the statutory period, in the County Court, for the same cause; but the complaint was dismissed, for want of jurisdiction in that court to entertain actions brought to recover a sum exceeding \$1,000. Thereafter the present action was begun, but not within the three months from the time the loss occurred; and the counsel for the plaintiff, appellant here, seeks to overcome this apparent obstacle to the maintenance of his legal proceeding by reference to section 405 of the Code of Civil Procedure. That section provides that where an action is commenced within the time limited therefor, and it is terminated by a reversal of a judgment without awarding a new trial; or in any other manner than by voluntary discontinuance, dismissal for neglect to proceed, or a final judgment on the merits, the plaintiff may commence a new action for the same cause within one year after such reversal or termination. If that section is applicable, this cause of action might be saved; but I think it clear that it cannot apply.

By reference to section 414 of the Code, the provisions of that chapter on limitations are made to "apply and constitute the only rules of limitation applicable to a civil action or special proceeding, except in one of the following cases: "A case where a different limitation is specially prescribed by law, etc." It must be evident that, as this action is brought under a special law and is maintainable solely by its authority, the limitation of time is so incorporated with the remedy given as to make it an integral part of it and the condition precedent to the maintenance of the action at all. Section 405 was enacted with reference to the enforcement of the civil remedies prescribed by the Code, and its application is to actions generally and which the Code of Civil Procedure was enacted to regulate. But this special law of 1855 gave a civil remedy, which is independent of the Code remedies, and in enacting section 414, the legislature, obviously, had in view to except those particular or special remedies by action, which they had

Statement of case.

the power to allow, and to leave themselves free to attach such conditions as to limitation of time as they saw fit. So, in the law of 1855 in question, they made it a condition that the action must be brought within three months from the occurrence of the loss, and plaintiff is bound by that limitation.

For the reasons expressed the order appealed from should be affirmed, and, under the stipulation of the appellant, judgment should be awarded in favor of the defendant, with costs.

All concur.

Order affirmed and judgment accordingly.

JEREMIAH SULLIVAN et al., Respondents, v. THE NEW YORK
AND ROSENDALE CEMENT COMPANY, Appellant.

In an action to recover damages for the alleged breach of a contract, the complaint alleged that in August, 1884, the plaintiffs S. and F., with E. and B. as joint contractors, entered into a contract, in writing, with defendant to construct a tunnel in its quarry for a certain amount per foot; that prior to any breach thereof, E. and B., with consent of defendant and of S. and F., abandoned the work, leaving further performance to the latter, who continued it and received, from time to time, the contract price, as the work progressed; that on January 2, 1885, D., the other plaintiff, became, with the consent of defendant and S. and F., one of the contracting parties, and was substituted in place of E. and B., by formally executing the original contract; that on December 20, 1885, plaintiffs, at defendant's request, consented to a suspension of the work for two weeks; at the end thereof, they presented themselves at the tunnel, and at defendant's place of business, and offered to resume work under the contract, but defendant would not permit them to do so, and, from day to day thereafter, they notified defendant of their willingness to do so, but the latter would not permit them, and they were compelled to seek other employment. Defendant set up as a defense a default of parties plaintiff, in that E. and B., who were still living, were not joined as plaintiffs. *Held*, that the connection of E. and B. with the contract and the work was fairly disclosed by the allegations of the complaint; that, under the circumstances, it did not appear that when the action was commenced they had any interest in the contract; but that if there was a defect of parties plaintiff it appeared upon the face of the complaint, and defendant could only object by demurrer, and not having done so, the objection

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Statement of case.

was waived (Code Civ. Pro. §§ 488, 498, 499); that it was not necessary that the complaint should show, affirmatively, that E. and B. were living at the commencement of the action in order to make the complaint demurrable, as the presumption of life applies.

As to the breach alleged there was a conflict of evidence, plaintiffs claiming that the suspension was for two weeks only, defendant that no time was specified, or in any event the work was not to be resumed until the commencement of other work on the quarries, which had been suspended at the same time. It appeared that, on December 18, 1885, defendant's agent and plaintiffs agreed to a temporary suspension of the work, and plaintiffs were paid the amount due up to that time. Two weeks after the suspension plaintiffs had several conversations with defendant's agent about a resumption. According to plaintiffs' version they expressed a desire to go on, but defendant fixed no time for resumption. The other work was not fully resumed until January 25, 1886. On February 11, plaintiffs wrote to defendant demanding a definite answer, whether they were to be permitted to perform the contract, stating that they were ready to complete it and requesting an immediate reply. On February 19, defendant claimed it caused verbal notice to be given to plaintiffs that they were at liberty to resume work under the contract. Between the date of plaintiffs' letter and such notice the plaintiffs had obtained employment elsewhere. On February 24, defendant's agent wrote to plaintiffs notifying them to proceed with the work under the contract. This they refused to do, unless compensated for their damages caused by the unreasonable suspension of the work. *Held*, that the question as to how long the work was to be actually suspended, and whether defendant's delay in omitting to notify plaintiffs to resume work after request was unreasonable, was properly submitted to the jury; and they having found in favor of plaintiffs, that a breach of the contract was established.

(Argued January 22, 1890 ; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 17, 1888, which affirmed a judgment in favor of plaintiffs, entered upon a verdict.

The nature of the action and the facts are sufficiently stated in the opinion.

John J. Linson for appellants. There was no breach of the contract on defendant's part ; but, on the contrary, it was plaintiffs who were guilty of a breach, by reason whereof a nonsuit should have been granted. (*Viele v. T. & B. R. R. Co.*, 21 Barb. 381 ; 20 N. Y. 184 ; *King v. Wilson*, 6 Beav.

Statement of case.

124; *Barney v. Loper*, 16 Barb. 629; *Titus v. G. F. Ins. Co.*, 81 N. Y. 419; *Battell v. Matat*, 2 N. E. Rep. 491; *McKnight v. Dunlop*, 5 N. Y. 537; *Goodsell v. W. U. T. Co.*, 13 N. Y. S. R. 278; *Rodermund v. Clark*, 46 N. Y. 354; *Lawson v. Hogan*, 93 id. 39; 13 Wkly. Dig. 8; *Davison v. Jersey Associates*, 71 N. Y. 333; *Newton v. Wales*, 3 Robt. 453; *Parr v. Greenbush*, 112 N. Y. 246; *Reynolds v. Nelson*, 6 Mad. 18; *Cythe v. La Fontain*, 51 Barb. 186; *Roth v. B. & S. L. R. Co.*, 34 N. Y. 553; *Davis v. Gwynne*, 57 id. 677; *Hedges v. H. R. R. Co.*, 49 id. 223; *Bryden v. Bryden*, 11 Johns. 206.) No injustice is done by the application of these well settled principles; on the contrary the recovery is inequitable. (*Smoot's Case*, 15 Wall. 36; *Allanmon v. Mayer*, 43 Barb. 33; *Barker v. Rose*, 5 Hill, 76; 2 Chitty on Cont. 1091; Sedgwick on Dam. 257; *Fay v. Oliver*, 20 Vt. 118; *Smith v. Brady*, 17 N. Y. 173.) The learned trial court erred in permitting an improper element in the case, which must have misled the jury. (*Graves v. Hunt*, 26 Wkly. Dig. 567.) There is a misjoinder of parties plaintiff. (*Coe v. Hobby*, 72 N. Y. 141; *Mitchell v. Hawley*, 4 Den. 412; *Kuhn v. Stevens*, 36 How. Pr. 275; Code Civ. Pro. § 448; *P. Bank v. Donnell*, 40 N. Y. 410; *Harris v. Hollister*, 64 id. 1; *Burgess v. Abbott*, 6 Hill, 135; *Strong v. Wheaton*, 38 Barb. 616; *Brainard v. Jones*, 11 How. Pr. 569; *Scofield v. Van Seykle*, 23 id. 97; *Merritt v. Walsh*, 32 N. Y. 685; *De Puy v. Strong*, 37 id. 372; *Sanders v. City of Yonkers*, 63 id. 489.)

D. M. De Witt for respondents. At the expiration of the period of suspension agreed to for the accommodation of the defendant, the plaintiffs had the right to resume operations; and any prevention, hinderance or refusal on the part of the defendant constituted in law a total breach of the contract. (2 Addison on Cont. § 871; *Du Bois v. D. & H. C. Co.*, 4 Wend. 285; *Taylor v. Bradley*, 39 N. Y. 129, 144; *Howard v. Daly*, 61 id. 362, 370; *Canda v. Wick*, 100 id. 127; *McKnight v. Dunlop*, 5 id. 537, 544; *Barber v. Rose*, 5 Hill, 76; 2 Parsons on Cont. 662; *Kipp v. Wiles*, 3 Sandf. 585,

Opinion of the Court, per O'BRIEN, J.

588; *Glacius v. Black*, 50 N. Y. 145, 149; *Levy v. Burgess*, 64 id. 390.) The court erred in charging that if the plaintiffs were given, within a reasonable time and before they had engaged in other work, an opportunity to go on with the work that they would be bound to finish it. (*Moody v. Osgood*, 54 N. Y. 488, 495; *Morehouse v. Yeager*, 71 id. 594; *Rexter v. Starin*, 73 id. 601.) There was no error in the court's declining to charge the proposition that the plaintiffs had a right to go on with the work and hold the defendant for damages sustained by the delay. (*Moody v. Osgood*, 54 N. Y. 488.) The defect of the parties plaintiff, if any, appearing on the face of the complaint, the defendant should have demurred; and, it not having done so, this objection is waived. (Code Civ. Pro. §§ 488, 498, 499; *Zabriskie v. Smith*, 13 N. Y. 322, 336, 337; *Merritt v. Walsh*, 32 id. 685, 689, 690; *Depuy v. Strong*, 37 id. 372; *Eaton v. Balcom*, 33 How. Pr. 80; *Sanders v. Yonkers*, 63 N. Y. 489, 493; *Green v. Lippincott*, 53 How. Pr. 33; *Patchin v. Peck*, 38 N. Y. 39.) Neither Bradley nor Enright was a necessary party plaintiff. (1 Lindley on Part. §§ 55, 436-7, 444, 449; 1 Bates on Part. § 329; 2 id. § 1025; *Thrall v. Seward*, 37 Vt. 573; *Maynard v. Briggs*, 26 id. 94; *Anderson v. Holmes*, 14 S. C. 162; Bishop on Cont., §§ 130, 133, 136, 137, 795, 796; *Lattimore v. Harson*, 14 Johns. 330; *Dearborn v. Cross*, 7 Cow. 48; *Delacroix v. Bulkley*, 13 Wend. 71, 75; *Jewell v. Schroepel*, 4 Cow. 564; 2 Parsons on Cont. 721; *Briggs v. Partridge*, 64 N. Y. 357, 364; *Du Bois v. D. & H. C. Co.*, 4 Wend. 285; *Lawrence v. Taylor*, 5 Hill, 107, 113.) The rule of damages as laid down by the court was not excepted to by defendant, and was correct. (*Masterson v. Mayor, etc.* 7 Hill, 61, 69; *Devlin v. Mayor, etc.* 63 N. Y. 8, 25; *Danalds v. State* 89 id. 36; *Bagley v. Smith*, 10 id. 489, 500.)

O'BRIEN, J. The plaintiffs recovered damages in this action for the breach of a contract to construct a tunnel at the defendant's cement works. The complaint alleges and it appears that on the 15th day of August, 1884, the plaintiffs Sullivan

Opinion of the Court, per O'BRIEN, J.

and Foley, with James Enright and Patrick Bradley as joint contractors, entered into a written contract with the defendant, whereby they undertook to construct and complete a tunnel or shaft in the defendant's quarry, the dimensions of which were therein particularly stated. The defendant on its part agreed to pay the contractors for the construction of the tunnel fourteen dollars per face or running foot up to April 1, 1885, and after that date the sum of sixteen dollars per face or running foot until the tunnel should be completed. The defendant was to furnish the necessary materials, and the plaintiffs were to perform the labor, and work was to be commenced August 17, 1884.

The complaint alleged that, before any breach thereof, Bradley and Enright, two of the original contractors, with the consent of the defendant and of their two associates before named, abandoned the work on account of ill-health, and left the performance of the contract to their associates, who continued the work and received the contract price per foot from the defendant, from time to time, as the work was performed. That on January 2, 1885, the plaintiff Daniel Buckley became, with the consent of the defendant and Sullivan and Foley, one of the contracting parties in the place of the other two who, as before stated, had abandoned the work. At this time Buckley was substituted as a party by formally executing the original paper, the defendant assenting thereto. That on the 20th of December, 1885, the plaintiffs, at the request of the defendant, consented to the suspension of the work for two weeks and not longer. That at the expiration of that time the plaintiffs presented themselves at the tunnel and at the defendant's place of business and offered to resume the work under the contract, but the defendant would not permit them to do so, nor furnish them the necessary materials to continue it. That the plaintiffs after that time, from day to day, continued to hold themselves in readiness to go on with the contract, and signified to the defendant their willingness to do so, but were not permitted to by the defendant, until at last the plaintiffs were compelled by necessity to seek other employment. That

Opinion of the Court, per O'BRIEN, J.

plaintiffs were thereby subjected to loss, and damages were demanded for a breach of the contract. The defendant denied all these allegations, and set up as a special defense that there was a defect of parties plaintiff, in that James Enright and Patrick Bradley, who were still living, were jointly interested with the plaintiffs in the cause of action, but were not joined as plaintiffs.

On the trial, the written contract, as changed by the substitution of Buckley, was produced, and there was no controversy in regard to its execution, delivery or validity. As to the breach alleged by the plaintiffs there was conflicting evidence; the plaintiffs claiming that the suspension was for two weeks only, while the defendant claimed that no time was specified for resuming the work, or, at all events, it was not to be resumed until the commencement of the other general work upon the quarries, which had been suspended at the same time.

Evidence was given by both parties on this question, and it appeared that on the 18th of December, 1885, the defendant's agent and the plaintiffs agreed to a temporary suspension of the work on the contract, and the work was accordingly suspended, the plaintiffs having been paid the balance due them for work up to that time. At the same time the general work in the quarries was also suspended and was not fully resumed until on or about the twenty-fifth of January following. After the expiration of the two weeks several conversations took place between the plaintiffs and the defendant's agent in regard to a resumption of the work under the contract in question; but the defendant did not, according to the plaintiffs' version, fix any definite time for resuming work, though the plaintiffs expressed a desire to go on, and negotiations to the same effect continued and were had between the plaintiffs and defendant from time to time without any results, until the 11th of February, 1886, when a letter was addressed by the plaintiffs to the defendant demanding a definite answer whether or not they were to be permitted to perform the contract, stating at the same time that they were ready to complete it on their part, and requesting an immediate reply.

Opinion of the Court, per O'BRIEN, J.

The defendant claims that, on the nineteenth of February following, it caused verbal notice to be given to the plaintiffs to the effect that they were at liberty to resume work under the contract. There is some conflict in the evidence as to whether this notice was in fact given as early as that date ; but at all events it seems to be the first attempt made on the part of the defendant to comply with the plaintiffs' letter of the eleventh of February, or the demand previously made ; and if this notice was given it seems to be the first definite move on defendant's part to permit plaintiffs to resume the work. In the meantime Foley and Buckley, failing to receive an earlier reply, sought and obtained work elsewhere, and Sullivan, apparently abandoning the contract, obtained general employment in the defendant's quarry. On the twenty-fourth of February the defendant's agent wrote to the plaintiffs notifying them to proceed with the tunnel, which the plaintiffs declined to do unless the defendant would compensate them for their damages occasioned by the unreasonable suspension of the work, or would signify its willingness to do so. This demand on the part of the plaintiffs was not complied with. The plaintiffs never, in fact, resumed the work, and brought this action to recover their damages.

While it may be said that the acts and omissions of the defendant in regard to the contract prior to the eleventh day of February were waived by the plaintiffs' letter of that date offering to go on with the work, had the defendant consented, the question still remains whether the delay in answering the plaintiffs' letter, or complying with their definite request, was unreasonable ; and upon this question the negotiations between the parties prior to the date of the letter, the condition in which the plaintiffs were placed after the suspension, and the fact that in the meantime they sought and obtained employment elsewhere, as well as the conduct and motives of the defendant, and all the other circumstances were to be considered. If the defendant's permission to allow the plaintiffs to resume work under the contract was unreasonably withheld or delayed, the plaintiffs, under the circumstances, had the right

Opinion of the Court, per O'BRIEN, J.

to treat the contract as broken, and to seek and obtain other employment, as they did. The breach of the contract was predicated on the unreasonable delay of the defendant to permit the contractors to go on with the work after having been requested to do so, and the evidence on this point being conflicting, and of such a character that different inferences could be drawn from it, a question of fact was presented.

The trial court submitted to the jury the question as to how long the work was actually to be suspended under the agreement between the plaintiffs and the defendant, and also the question whether the defendant's delay in omitting to notify the plaintiffs to resume work after request was or was not, under all the circumstances of the case, unreasonable, instructing them that if, in their opinion, the delay on the part of the defendant was unreasonable, then a breach of the contract was established.

We think the verdict of the jury must be taken as a determination of this question in favor of the plaintiffs. It is true that reasonable time, or, as in this case, whether the delay was reasonable or not, is generally a question of law. But that is so only when the facts are clearly established, or are undisputed or admitted. If the facts are not clearly established, or if the question of time depends upon other controverted facts, or where the motives of a party enter into the question, it must necessarily be submitted to the jury as a question of fact. (*Mead v. Parker*, 111 N. Y. 262; *Lawrence v. Ocean Ins. Co.*, 11 Johns. 241; 2 *Parsons on Cont.* 662; *Howe v. Huntington*, 15 Me. 354; *Hill v. Hobart*, 16 id. 164; *Greene v. Dingley*, 24 id. 131; *Cocker v. F. H. & F. M. Co.*, 3 Sum. 530; *Ellis v. Thompson*, 3 M. & W. 445.)

We think the evidence in this case as to the period of time during which the work was to be suspended by agreement of the parties, as well as that bearing upon the omission of the defendant to notify or permit the plaintiffs to resume the work upon which allegation a breach of the contract was sought to be established, was properly submitted to the jury.

As to the nonjoinder of Enright and Bradley, as parties plaintiff, their connection with the contract and the work,

Opinion of the Court, per O'BRIEN, J.

was fully disclosed by the allegations of the complaint. It was alleged that, prior to the suspension of the work, on the 18th of December, both of them had abandoned the contract and that the plaintiffs, with defendant's consent, continued the work in the same manner as if they had been the sole original contractors. They were treated as such by the defendant, as they were paid for their work from time to time as it progressed. Moreover, the omitted persons were not parties to the agreement under which the work was suspended, nor to the subsequent negotiations with the defendant for its resumption, which it was claimed amounted to a breach of the contract. No recovery is claimed for anything done under the contract prior to the time they abandoned it, with the consent of all the other parties. Under these circumstances it is by no means certain that they had any interest in this contract at the time the action was commenced. It might well be said that, by the acts and agreements of the plaintiffs and the defendant, those two persons were released from their obligations and the plaintiffs substituted in their place as sole contractors. It is not necessary, however, to pass upon that question, as it is quite clear that the defendant has not taken that objection in the proper way.

The defect, if any, appeared upon the face of the complaint, and, therefore, the defendant could make the objection only by demurrer. Not having done so the objection is waived. (Code, §§ 488, 498, 499.)

It is urged on the part of the defendant that, inasmuch as the complaint did not state that these two persons were living at the time of the commencement of the action, a demurrer was not proper and could not be sustained. We think that it was not necessary that the complaint should affirmatively show that the parties were living at the commencement of the action in order to make the complaint demurrable. All the other facts sufficient to warrant a demurrer appearing on the face of the complaint and the objection having been made by reason of a nonjoinder of parties plaintiff, the usual presumption of life applies for this purpose. (*Burgess v. Abbott*,

Statement of case.

1 Hill, 476; *Zabriskie v. Smith*, 13 N. Y. 322; *Merritt v. Walsh*, 32 id. 685; *DePuy v. Strong*, 37 id. 372; *Sanders v. Yonkers*, 63 id. 489; *Eaton v. Balcom*, 33 How. Pr. 80; *Green v. Lippincott*, 53 id. 33.)

We have examined the exceptions taken by the defendant on the trial and to the charge of the court, and are of opinion that none of them are tenable.

The judgment should be affirmed.

All concur.

Judgment affirmed.

HOWARD VOSBURGH, Appellant, v. JOHN F. DIEFENDORF,
Respondent.

Where the maker of negotiable paper shows that it has been obtained from him by fraud, a subsequent transferee, must, before he is entitled to recover thereon, show that he is a *bona fide* purchaser, or that he derived his title from such a purchaser. It is not sufficient to show simply that he purchased before maturity and paid value, he must show that he had no knowledge or notice of the fraud.

In an action upon a promissory note against defendant as maker, it appeared that his signature thereto was procured by fraud. The note was purchased of the payee by R. before maturity, for half its face value. Plaintiff claimed as purchaser from R. Defendant's evidence tended to show that R. purchased with moneys furnished by plaintiff, who was present at the time of the transfer and directed R. to purchase. R. testified that he had no knowledge of the fraudulent origin of the paper, or of any facts constituting a defense. Neither the plaintiff nor the payee were sworn as witnesses. The trial court held that plaintiff, as matter of law, was entitled to recover the amount he paid for the note, but if anything beyond that was claimed, the case was one for the jury. Plaintiff having elected to take a verdict for the amount he paid for the note, a verdict was directed accordingly. *Held*, error; that the question as to whether plaintiff was a *bona fide* purchaser, was one of fact for the jury; as was also the question as to whether R. purchased for himself or as agent; that if in the latter capacity, although he was not chargeable with notice of the fraud, this would not shield plaintiff from the legal consequences of any notice he himself might have had.

Dalrymple v. Hillenbrand (62 N. Y. 5), *Cowing v. Altman* (71 id. 435), distinguished.

(Argued January 22, 1890; decided February 25, 1890.)

119	357
123	206

119	357
130	9
130	661

119	357
145	506

119	357
d148	705

119	357
150	66

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159	199

119	357
162	118

119	357
e172	257
172	267

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department made May 17, 1888, which reversed a judgment in favor of plaintiff entered upon a verdict directed by the court, and granted a new trial.

The nature of the action and the material facts are stated in the opinion.

Matthew Hale for appellant. There was no question of fact to be submitted to the jury. (*Kelly v. Burroughs*, 102 N. Y. 93, 95, 96; 51 Hun, 537; 1 Daniel on Neg. Inst. § 803; *Com. v. Clark*, 94 U. S. 278; *Cromwell v. County of Sac*, 96 id. 351; *Griffith v. Griffith*, 9 Paige, 315; *Varick v. Briggs*, 6 id. 323.) The plaintiff was entitled to a verdict upon the facts and the trial court properly so held. (*Hart v. Potter*, 4 Duer, 458; *Dalrymple v. Hillenbrand*, 62 N. Y. 5, 6; *Cowing v. Altman*, 71 id. 435, 439, 440; 1 Daniel on Neg. Inst. [2d ed.] 668, § 819; Byles on Bills, 118; *Catlin v. Hanson*, 1 Duer, 309; *Davis v. Bartlett*, 12 Ohio St. 534; *Phelan v. Moss*, 67 Penn. St. 59; *Swift v. Smith*, 102 U. S. 442; *Bailey v. Smith*, 14 Ohio St. 462; *Goodman v. Simonds*, 20 How. [U. S.] 343; *Murray v. Lardner*, 2 Wall. 110; *Chapman v. Rose*, 56 N. Y. 137, 140; *N. Bank v. Young*, 41 N. J. Eq. 531, 538; *Seymour v. McKinstry*, 106 N. Y. 240; 43 id. 301; *Bailey v. Bidwell*, 13 M. & W. 73; *Hart v. Potter*, 4 Duer, 458; *Bay v. Coddington*, 5 Johns. Ch. 54; 20 Johns. 634; *Stalker v. McDonald*, 6 Hill, 93; *McBride v. F. Bank*, 26 N. Y. 450, 454; *Comstock v. Hier*, 73 id. 269, 273; *Swift v. Tyson*, 16 Pet. 1.) The trial court properly held that there was no question of usury arising upon the evidence in the case. (*Manning v. Tyler*, 21 N. Y. 567; *W. T. & C. Co. v. Kilderhouse*, 87 id. 430, 436; *Morford v. Davis*, 28 id. 481; *Harger v. Wilson*, 63 Barb. 237; *Howe v. Potter*, 61 id. 356.) No defense was proved under chapter 65 of the Laws of 1877, and the court properly ruled against the defendant on the question. (*Herdic v. Roessler*, 109 N. Y. 127.)

Statement of case.

Z. S. Westbrook for respondent. The note in question is absolutely void under chapter 65, Laws of 1877, in not having the words "given for a patent right," written or printed upon the face thereof, above the signature, as thereby required, in the hands of any purchaser who is not a *bona fide* holder. (Laws of 1877, chap. 65; *Spring v. Quance*, 3 How. Pr. [N. S.] 65; *Palmer v. Minor*, 8 Hun, 342; *Herdie v. Roessler*, 109 N. Y. 127; *Barton v. P. J., etc., P. R. Co.*, 17 Barb. 397.) The note in question is void for usury, it never having had a valid inception before the transfer thereof to plaintiff at an unlawful rate of discount, that is, for fifty per cent of its face value. (*Ramsdell v. Morgan*, 16 Wend. 574; *Hall v. Wilson*, 16 Barb. 548, 550; *Wardell v. Howell*, 9 Wend. 170; *Catlin v. Gunter*, 11 N. Y. 368; *Eastman v. Shaw*, 65 id. 522; *Sweet v. Chapman*, 7 Hun, 576.) The cancellation of the note was valid, and that of itself, though it was a sham and the note was not in fact burned up, annulled the note and rendered it invalid as an obligation. It was a good cancellation, without any consideration paid therefor. (*Larken v. Hardenbrook*, 90 N. Y. 333.) The court erred in holding that as a matter of law the plaintiff was a *bona fide* holder of the note, and entitled, therefore, to recover the amount paid for the same. (1 Randolph on Neg. Paper, § 14; 1 Parsons on Cont. 254; *Stalher v. McDonald*, 6 Hill, 93.) The question whether plaintiff was a *bona fide* holder, should have been submitted to the jury. (*F. N. Bank v. Green*, 43 N. Y. 298; *F. & C. N. Bank v. Noxon*, 45 id. 762; *G. Bank v. Penfield*, 69 id. 502; *Comstock v. Hier*, 73 id. 273, 274; *D. S. M. Co. v. Best*, 105 id. 59; *Seymour v. McKinstry*, 106 id. 240; *Vosburgh v. Diefendorf*, 16 N. Y. S. R. 493; *Stewart v. Lansing*, 104 U. S. 505; *Wardell v. Howell*, 9 Wend. 107; *Tinsdale v. Murray*, 9 Daly, 446, 449; *Benton v. Martin*, 52 N. Y. 570; *Bookstaver v. Jayne*, 60 id. 146; Daniels on Neg. Inst. § 777; *Williamson v. Brown*, 15 N. Y. 354; *Gould v. Stevens*, 43 Vt. 125; *Baker v. Bliss*, 39 N. Y. 70; *Nutter v. Stover*, 48 Me. 163; *Steinhart v. Baker*, 34 Barb. 436; *Hamilton v. Marks* 52 Mo. 78; *Merritt v.*

Statement of case.

Duncan, 7 Hisk. 156; 1 Daniels on Neg. Inst. 746; Chitty on Bills and Notes, 295; 1 Edwards on Bills and Notes, § 517; 1 Parsons on Bills, 260; Story on Prom. Notes, § 197; 2 Randolph on Coml. Paper, 693; *Smith v. Harlon*, 64 Me. 510; *Oakley v. Ordeen*, 2 F. F. 656; *Craft's Appeal*, 42 Conn. 146; *Austin v. Grunner*, 90 Ill. 300; *Lay v. Wissman*, 36 Ia. 305; *De Witt v. Perkins*, 22 Wis. 474; *Bailey v. Smith*, 14 Ohio St. 396; *Herth v. M. N. Bank*, 34 Ind. 380; *Gould v. Stevens*, 43 Vt. 125; *Goldsmid v. L. C. Bank*, 16 Barb. 410; *Gould v. Segee*, 5 Duer, 270; *Taylor v. Atchison*, 54 Ill. 196; *Ormsbee v. How*, 54 Vt. 182; *Brookman v. Milbank*, 50 N. Y. 378.) The plaintiff was bound to prove that he was a *bona fide* holder. (*Stewart v. Lansing*, 104 N. Y. 505; *Elwood v. W. U. T. Co.* 45 id. 549, 554; *Kavanaugh v. Wilson*, 70 id. 177, 179; *Sheridan v. Mayor, etc.*, 8 Hun, 424; *McNulty v. Hurd*, 86 N. Y. 547, 553, 554; *Gildersleeve v. Landon*, 73 id. 609, 610; *Dean v. Van Nostrand*, 23 Wkly. Dig. 97; *Longyear v. U. S. L. Ins. Co.*, 20 id. 165; *Honegger v. Wettstein*, 94 N. Y. 252, 261; *Karney v. Mayor, etc.*, 92 id. 617; *Cross v. Cross*, 108 id. 628; *Becker v. Roch*, 104 id. 394, 404; *People ex rel. v. French*, 17 N. Y. S. R. 100; *Moody v. Prell*, 2 Abb. [N. C.] 274; *Stillwell v. Carpenter*, 2 id. 238; *Hodge v. City of Buffalo*, 1 Abb. [N. C.] 356; *Nicholson v. Connor*, 8 Daly, 212; *Posthoff v. Schreiber*, 47 Hun, 593, 598; 94 N. Y. 261; 86 id. 553, 554.) Giving *prima facie* evidence of a fact does not shift the burden of proof. (*Heinman v. Heard*, 62 N. Y. 448.) The failure of plaintiff to produce witnesses Henderson and Van Valkenburgh, as well as himself, to testify in his behalf, were strong circumstances against him. (*Brooks v. Stern*, 6 Hun, 516; 15 J. & S. 436; *Bleecker v. Johnston*, 69 N. Y. 309.) The order will be affirmed, if there were any legal errors of the trial court appearing in the record, whether noticed by the court below or not. (*Mackay v. Lewis*, 73 N. Y. 382.)

Opinion of the Court, per O'BRIEN, J.

O'BRIEN, J. This action was upon an instrument, in form, a promissory note, of which the following is a copy :

“\$2,000. GOUVERNEUR, N. Y., *December* 15, 1886.

“Sixty days after date I promise to pay R. T. Van Valkenburgh or bearer Two Thousand Dollars at Spraker's National Bank, Canajoharie, N. Y., value received, with interest at the rate of six per cent per annum.

“JOHN F. DIEFENDORF.”

The defendant is the maker of the note, and at its date was a farmer who lived in the town of Root, about ten miles from Canajoharie, where, by the terms of the instrument, it was payable.

The defenses interposed to the note are,

1. That it was obtained from defendant by fraud and deceit practiced upon him by the payee.

2. That its only consideration was an interest in a patent right for improvements in fire kindlers, and that it did not comply with the provisions of chapter 65 of the Laws of 1877, requiring the words, “given for a patent right,” to be written or printed across the face thereof.

3. That the note was void for usury, in that, before it had any legal inception, it was transferred to the plaintiff for one-half its face value.

4. That the note was never executed or delivered as a note or valid obligation, and that between the original parties thereto it had been cancelled and destroyed, and that the plaintiff was not a *bona fide* holder.

The defendant testified at the trial and gave his version of the transaction, which resulted in his signing the note in question. In brief it is this: In the month of December, 1886, one Henderson, who falsely represented that he was interested in a firm, composed of himself, the payee of the note, and another person, that was engaged in manufacturing fire kindlers under a patent, which was a valuable invention, and that the business promised large gains, called upon the defendant at his house and induced him to

Opinion of the Court, per O'BRIEN, J.

go to Rochester with him, to the end that he might obtain an interest in the business, or be employed in connection with it. The defendant went to Rochester, and there was introduced to Van Valkenburgh, the payee of the note in question. It does not distinctly appear what took place at Rochester, except that the defendant gave his notes for \$8,000, on the representations, as he claims, that these notes were not to be used or transferred, and were simply memoranda showing his one-third interest in the business of manufacturing and selling fire kindlers. While defendant was at Rochester Henderson disappeared, and it seems went to Canajoharie and negotiated the notes thus obtained. In the meantime Van Valkenburgh induced the defendant to go with him to Gouverneur, where they arrived a day or two before the date of the note in question. The defendant supposed he was to aid in some way in the sale of the right to manufacture and sell the fire kindlers under the patent in which he supposed he had, or was about to have, an interest as an equal partner with Henderson and Van Valkenburgh. On arriving at Gouverneur, they went to a hotel and there met two other persons, who pretended to be anxious to purchase the right covered by the patent for the state of Iowa. These two persons with the defendant, and the payee of the note in question, went to a room and there the defendant was induced to sign two notes of \$2,000 each, of which the note in suit is one. Van Valkenburgh pretended to sell, and the two persons before referred to to buy, two-thirds of the right covered by the patent in the state of Iowa for \$8,000, and in the presence of defendant each of them gave, or pretended to give, to Van Valkenburgh his note for \$4,000. Defendant was told by Van Valkenburgh that, in order to consummate this sale, it would be necessary for him to go through the form of giving his note for the same amount, that is to say \$4,000, in order to represent the interest that the firm still retained in that state. That after the transaction was completed this note could be returned to him, and that, in any event, the paper would not be used as a note, or transferred. The defendant assented to this arrangement and Van Valkenburgh

Opinion of the Court, per O'BRIEN, J.

thereupon drew, and procured the defendant to sign and deliver, the two notes of \$2,000 each. After all the parties had left the room and defendant supposed that the transaction was completed, and that the notes he signed had answered the purpose for which they were intended, he called the attention of Van Valkenburgh to the promise he had made to destroy the notes, whereupon he drew from his pocket two pieces of paper that appeared like the notes defendant had signed and burnt them in defendant's presence. The defendant and Van Valkenburgh then parted, the defendant returning to his home, in Montgomery county, and without seeing either Henderson or Van Valkenburgh afterwards.

The plaintiff claimed to have purchased the note in suit from one Richmond, a few days after its date, and Richmond claimed to have bought it the same day from Henderson. The testimony was that Richmond, Henderson and the plaintiff were together at the time of the transaction that resulted in the transfer of the note to the plaintiff. That Henderson delivered to Richmond the two notes of \$2,000 each, made at Gouverneur, for half their face value ; that Richmond kept one of them himself and delivered the other to the plaintiff who furnished the money paid Henderson for it, and directed Richmond to purchase it. Richmond testified that he had no knowledge of the fraudulent origin of the paper, or of any fact constituting a defense thereto by the maker. The two persons who were present with the defendant and the payee of the note at Gouverneur when it was made testified in behalf of the plaintiff, and in contradiction of the defendant's version ; but neither the plaintiff, Henderson nor Van Valkenburgh were sworn.

It is plain that the jury could well have found, from the testimony of the defendant and the facts and circumstances surrounding the transaction, that the note in question was procured from the defendant through a gross fraud practiced upon him by the payee. This was the condition of the case when the proofs closed. The trial court thereupon ruled that the plaintiff, as matter of law, was entitled to recover the amount

he had paid for the note, but if anything beyond that was claimed, then the case was one for the jury. The plaintiff elected to take a verdict for one-half the face of the note and interest, and the court, against the defendant's objection and exception, directed a verdict accordingly, and the judgment entered thereon has been reversed by the General Term.

Apart from the claim that the plaintiff derived title to the note from one who was a *bona fide* holder, and, therefore, succeeded to all his rights, which will be noticed hereafter, he was not entitled to recover as the case stood. For all the purposes of this appeal it must be assumed that the note was procured by fraud practiced upon the defendant by the payee, because evidence was given from which such fact could have been found by the jury. The defendant had a good defense to the note against the payee, if it had remained in his hands and he had attempted to enforce it. The plaintiff was in no better position unless, within the law merchant, he was a *bona fide* holder, and as against the case made by the defendant on the trial, the plaintiff did not establish that character for himself by merely producing the note and proving that he paid one-half its face value for it. The learned counsel for the plaintiff contends that in this case the burden of proving notice to the plaintiff of the facts connected with the execution of the note and of the fraud, if any, was upon the defendant, and that in the absence of such proof by the defendant, the plaintiff was entitled to recover.

We think that this proposition cannot be maintained. Doubtless some support may be found for it in certain elementary books, and in some of the adjudged cases in other states. But in this state it must be regarded now as a settled rule that when the maker of negotiable paper shows that it has been obtained from him by fraud or duress, a subsequent transferee must, before entitled to recover on it, show that he is a *bona fide* purchaser. (*First Nat. Bk. v. Green*, 43 N. Y. 298; *F. & C. Nat. Bk. v. Noxon*, 45 id. 762; *Ocean Nat. Bk. v. Carll*, 55 id. 440; *Wilson v. Locke*, 58 id. 642; *Grocers' Bk. v. Penfield*, 69 id. 502; *Nickerson v. Ruger*, 76 id. 279; *Sey-*

Opinion of the Court, per O'BRIEN, J.

mour v. McKinstry, 106 id. 240; *Stewart v. Lansing*, 104 U. S. 505; *Smith v. Livingston*, 111 Mass. 342; *Sullivan v. Langley*, 120 id. 437.)

The plaintiff did not satisfy this rule by showing that he paid value for the note. It was necessary, in order to entitle him to recover, to go further and show that he had no knowledge or notice of the fraud with which the instrument was tainted from its origin. The large discount at which the plaintiff purchased the note, the circumstances attending the purchase, his knowledge of the original parties to the transactions, and especially of Henderson, one of the actors in the scheme which resulted in putting the note in circulation, were all proper subjects for the consideration of the jury, with reference to the plaintiff's innocence and good faith.

In *The First National Bank v. Green* (*supra*), RAPALLO, J., stated the rule of evidence in such cases in these words: "A plaintiff, suing upon a negotiable note or bill, is presumed, in the first instance, to be a *bona fide* holder. But when the maker has shown that the note was obtained from him under duress, or that he was defrauded of it, the plaintiff will then be required to show under what circumstances and for what value he became the holder. (2 Greenl. on Ev. § 172; *McClintick v. Cummins*, 2 McLean, 98; *Munroe v. Cooper*, 5 Pick. 412; *Holme v. Karsper*, 5 Binn. 469; *Valett v. Parker*, 6 Wend. 615; 1 Camp. 100; 2 id. 574; 4 N. Y. 166.) The reason for this rule, given in the later English cases, is that 'where there is fraud, the presumption is that he who is guilty will part with the note for the purpose of enabling some third party to recover upon it, and such presumption operates against the holder, and it devolves upon him to show that he gave value for it.' (*Bailey v. Bidwell*, 13 Mees. & Wels. 74; *Smith v. Braine*, 3 Eng. L. & Eq. 379, and in *Harvey v. Towers*, 4 id. 531.)" The rule established in this case has been adhered to in this court ever since, as will be seen from the cases above cited.

In *Stewart v. Lansing* (*supra*), WAITE, Ch. J., stated the principle thus: "It is an elementary rule that if fraud or ille-

Opinion of the Court, per O'BRIEN, J.

gality in the inception of negotiable paper is shown, an indorsee, before he can recover, must prove that he is a holder for value. The mere possession of the paper, under such circumstances, is not enough. (*Smith v. Sac County*, 11 Wall. 139.) Here the actual illegality of the paper was established. It was incumbent, therefore, on the plaintiff to show that he occupied the position of a *bona fide* holder before he could recover."

In *Smith v. Livingston* (*supra*), MORTON, J., expressed the rule in the following language: "The indorser of a promissory note who takes it for value, in good faith, in the usual course of business, before its maturity, is entitled to recover upon it, though the maker has a good defense against the payee on the ground that it was obtained by fraud. But upon proof that a note is founded in illegality, or was obtained or put in circulation fraudulently, the burden of proof is upon the indorsee to show that he took it for value and in good faith before maturity."

The learned counsel for the plaintiff has called our attention to two cases in this court which, he insists, sustain the rule contended for by him. (*Dalrymple v. Hillenbrand*, 62 N. Y. 5, and *Cowing v. Altman*, 71 id. 435.)

The first of these cases was an action by the holder against the indorser of a note, given by a firm which had been adjudicated bankrupt under the late act of congress to one of its creditors. The payment of the note was resisted by the indorser on the ground that it was illegal, or void under the statute prohibiting preferences by bankrupts. It was held that the giving of such a note was not a fraudulent preference under the law, though the makers, when they gave the note, had been adjudged bankrupts, because the advantage thus secured by the creditor was not payable out of the bankrupt's estate, but was due to the fact that the debtors were able and willing to procure the defendant's indorsement. The defense that the note was used by the creditor, in violation of a condition upon which the indorsement was given, was held untenable because not pleaded. The rule of evidence now under consideration was not involved.

Opinion of the Court, per O'BRIEN, J.

In *Cowing v. Altman*, the action was upon a check, payment of which was resisted by the maker upon the ground that it was given under an agreement to pay an assignee in bankruptcy a compensation greater than that provided by the act, and which was forbidden. It was held that the check was good in the hands of a *bona fide* holder. The check, however, was not transferred until fourteen months after its date, and the controversy in that case turned upon the point whether, when received by the plaintiff, it was not past due and dishonored. But it was shown that the bank from which the plaintiff took the check paid full value for it, and there was no attempt to impeach its right, except upon the ground that the check was past due. The question of actual notice to the bank of the consideration of the check was not raised and was not involved. These cases, when understood, do not decide any principle with respect to the burden of proof in cases where it is shown that the negotiable paper has been procured from the maker by fraud, inconsistent with the rule above stated.

The plaintiff did not meet the requirements of this rule, for he remained silent upon the subject of notice of the circumstances under which the maker gave the note. The most favorable view that could have been taken of the case for the plaintiff would still require the question of his good faith to be passed upon by the jury. It is true that the plaintiff could have recovered if he derived his title to the note from one who was a *bona fide* holder, even though he had notice himself of the fraudulent character of the paper. (*Cowing v. Altman*, 71 N. Y. 438, 443; *Cromwell v. County of Sac.* 96 U. S. 51; *Commissioners v. Clark*, 94 U. S. 278; *Eckhert v. Ellis*, 26 Hun, 664; Daniel on Neg. Inst. § 803 and cases cited; Story on Prom. Notes, § 191.) And it is contended that Richmond, from whom the plaintiff took the paper, was shown to be innocent of any imperfection in it. But the testimony tended to show that Richmond bought the note from Henderson, as the agent, and by direction of, and with funds subsequently furnished by the plaintiff. It is quite clear, we think, that the

Statement of case.

testimony on this point was of such a character that it could not be held that, absolutely and as a matter of law, Richmond ever had any title to the note, and, unless he had, his connection with its purchase, as a mere agent or instrument of the plaintiff, could not confer the character of a *bona fide* holder, or shield the plaintiff from the legal consequences of any notice that he might have had of the fraudulent origin of the paper as between the maker and the payee. The most that can properly be conceded in regard to this branch of the case, is that Richmond's connection with the transfer, and whether, as owner or agent of the plaintiff, was a question of fact for the jury. The good faith of Richmond was not available to strengthen the plaintiff's case, unless it was found that Richmond was the owner of the note when it was delivered to the plaintiff.

It follows that the General Term properly reversed the judgment, and as this conclusion disposes of the case, it is not necessary to consider the other questions raised.

The order appealed from should be affirmed and judgment absolute ordered for the defendant, with costs.

All concur.

Order affirmed and judgment accordingly.

MIRIAM C. MILLER et al., Appellants, v. EGBERT RINEHART,
Respondent.

D. B. Miller was the holder of certain mortgage bonds to the amount of \$3,000, issued by a corporation, the payment of which was guaranteed by defendant. Pending negotiations between the bondholders and the railroad company for an adjustment, and to obtain her consent to some arrangement for a surrender of the bonds, defendant executed an instrument which, after reciting the facts and stating defendant's desire "for the surrender and cancellation of said bonds, and the substitution of other securities in the place thereof," contained the following: "In the event that any or all of the matters and things hereinbefore mentioned or referred to shall happen, or in case the said bonds or any guaranty shall be cancelled or destroyed or otherwise disposed of as required by said association hereafter, and in spite of and notwithstanding anything that may happen or be done at the request of said associa-

Statement of case.

tion, or in behalf thereof, my aforesaid guaranty of said bonds and my obligation created and incurred by reason of said guaranty, shall remain in full character and effect, and this is hereby declared to be a continuing running guaranty for the payment of said sum of \$3,000 and interest (according to the original terms of said original guaranty), attached to, and belonging to, and guaranteeing any and all securities, acts, papers, writings and proceedings of said association in regard to the said D. B. Miller, and of its indebtedness hereafter to be done, continued or made." Subsequently an agreement was made between the association and the bondholders which was executed by said Miller, under and by which the association sold and agreed to convey to a trustee for the bondholders certain real estate, at a price specified, being the amount of the outstanding bonds, "to be paid in the aforementioned bonds," and the mortgage to be cancelled of record. "It being understood (the agreement states) that there is nothing due thereon when said bonds shall be surrendered." Upon a sale of the real estate a less sum was realized than the amount of all the bonds. In an action to recover the balance, after application of their proportionate share in reduction of the amount represented by the bonds in question, *held*, that the instrument was simply one of guaranty, defendant obligating himself that the association would pay the indebtedness, evidenced by the bonds previously guaranteed by him, in whatever shape it might assume, and whatever might be accepted as a representative of the indebtedness in lieu of the bonds; and that, therefore, when the bonds were paid in full by the purchase and conveyance of the real estate, and the indebtedness thus cancelled, all liability upon the guaranty ceased, and so, the action was not maintainable.

(Argued January 22, 1890; decided February 25, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 19, 1888, which reversed a judgment in favor of plaintiff, entered upon the report of a referee, and ordered a new trial.

One William Miller purchased twelve bonds for \$1,000 each, made by the Sea Cliff, etc., Association, and secured by a second mortgage upon its real estate, and also, by a chattel mortgage. He was influenced in their purchase by the defendant, who was interested in the corporate projects, and who gave, at the time of the purchase, this written guaranty:

"NEW YORK, *November 21, 1876.*

"In consideration of the sum of one dollar, to me in hand paid by Dr. Wm. Miller, the receipt whereof is hereby acknowl-

Statement of case.

edged, I hereby guarantee to him the payment of three certain bonds numbered 16, 17 and 18, being three of a series of mortgage bonds made by the Sea Cliff Grove and Metropolitan Camp Ground Association of one thousand dollars each, dated the first day of October, 1876, payable five years from date, with interest at seven per cent., payable semi-annually on the first days of April and October, at the National Shoe and Leather Bank.

“ This guarantee to include principal and interest..

“ Witness my hand this 4th day December, 1876.

“ EGBERT RINEHART.”

Miller subsequently died, and the bonds came into the possession of Dorothy B. Miller. While so held, an effort was made to effect an adjustment between the company and the second mortgage bondholders. The matter was in the hands of a joint committee and a meeting of bondholders was called for the afternoon of a certain day to receive the report. The report was sealed and the details of the plan were not definitely known. In the morning of the day for the meeting Mrs. Miller was approached to obtain her assent to some adjustment and to a surrender of her bonds. It was given upon the defendant's executing the following agreement :

“ Whereas, on the twenty-first day of November, or the fourth day of December, 1876, I, Egbert Rinehart, did guarantee the payment to Dr. William Miller of the three bonds mentioned in the paper hereunto annexed and marked ‘A,’ as in said paper mentioned (which said bonds are now the property of Mrs. D. B. Miller, widow of said William Miller).

“ And whereas, said bonds are a lien on the lands and real estate of the association mentioned in said paper ‘A,’ which paper is made a part of this instrument.

“ And whereas, I also desire the surrender and cancellation of said bonds and the substitution of other securities in the place thereof, to which the said D. B. Miller has consented and agreed.

“ Now, therefore, in consideration of the premises and of the sum of one dollar to me in hand paid by said D. B. Miller,

Statement of case.

and also divers other good and valuable considerations to me paid, the receipt whereof is hereby confessed and acknowledged, I, the said Egbert Rinehart, do hereby agree and further guarantee to and with said D. B. Miller, that in the event that any or all of the matters and things hereinbefore mentioned or referred to shall happen, or in case the said bonds of my said guaranty shall be cancelled or destroyed, or otherwise disposed of as required by said association hereafter, and in spite of and notwithstanding anything that may happen or be done at the request of said association, or in behalf thereof, my aforesaid guaranty of said bonds and my obligation created and incurred by reason of said guaranty, shall remain in full character and effect, and this is hereby declared to be a continuing running guaranty for the payment of said sum of three thousand dollars and interest (according to the original terms of said original guaranty), attached to, and belonging to, and guaranteeing any and all securities, acts, papers, writings and proceedings of said association in relation to the said D. B. Miller, and of its indebtedness to her hereafter to be done, continued or made.

“As witness my hand and seal this eighteenth day of February, A. D., 1880.

“EGBERT RINEHART. [L. s.]”

Subsequently, at the bondholder's meeting, an agreement was proposed and signed by Mrs. Miller, through her attorney, and by the other holders of bonds. It recited the issuance by the company of the bonds to the amount of \$78,200, secured by second mortgage; that the company was “desirous of paying and settling in full the aforesaid bonds and coupons for interest, and to have the mortgage discharged of record,” and the agreement was, first, that it sold and was to convey to a trustee for the bondholders certain hotel property and certain 216 lots.

“Second.—The said bondholders hereby purchase from the said, the ‘Sea Cliff Grove and Metropolitan Camp Ground Association,’ the aforesaid property at the price or sum of seventy-eight thousand two hundred dollars (\$78,200), upon

Statement of case.

the terms hereinbefore mentioned, and agree to pay the said sum of seventy-eight thousand two hundred dollars (\$78,200) in the aforementioned bonds of the said the 'Sea Cliff Grove and Metropolitan Camp Ground Association,' held by us respectively, and secured by the mortgage aforesaid, to John H. Stout and George B. Remsen; and we do further agree to cancel or to cause the said mortgage to be cancelled of record. It being understood that there is nothing due thereon when said bonds shall be surrendered, and surrender up the bonds of said association, together with the coupons for interest from the date of the last payment on said coupons on receiving the conveyance covenanted to be given in the first article of this agreement.

"This agreement is to bind the heirs, successors and assigns of the respective parties thereto, to the extent of the bonds held by them respectively, to a conveyance of a *pro rata* portion of said property to the extent of their said bonds, at the valuation this day submitted, a copy of which is hereto annexed and marked Schedule 'B,' and is to be performed and completed within six months of the date hereof.

"This instrument not to be binding unless signed by all the bondholders."

Subsequently these plaintiffs became the owners of the lots, and also the assignees of all rights under the agreements of guaranty of this defendant. The lots were sold at public auction in 1885, and, realizing less than the value of the bonds originally held, the plaintiffs commenced this action to hold the defendant for the difference, after proportionately applying the proceeds of sale to the amount represented by the former bonds mentioned in his guaranty.

B. Estes for appellant. The case on appeal to the General Term and to this court did not and does not contain any certificate, nor any statement whatever, to the effect that it contained, or now contains, all the evidence given on the trial, nor does it in any manner show that it included, or now includes, all the evidence bearing upon any question sought to

Statement of case.

be reviewed at the General Term. This omission precluded the General Term from reviewing any question of fact. (*Porter v. Smith*, 107 N. Y. 531; *D. S. M. Co. v. Best*, 50 Hun, 76; *Fell v. N. Y. L. Works*, 20 N. Y. S. R. 577; *Maxon v. Maxon*, 16 id. 74; *Averell v. Hurd*, 15 Civ. Pro. Rep. 162; *Wilkinson v. Herbert*, N. Y. S. R. 436; *Graff v. Ross*, 47 Hun, 152; *Harkness v. N. Y. E. R. R. Co.*, 23 J. & S. 532; *Cortice v. West*, 50 Hun, 47; *Spence v. Chambers*, 39 id. 193; *Lowery v. Erskine*, 113 N. Y. 52; *Baird v. Mayor, etc.*, 96 id. 577; *Van Buckelin v. Berdel*, 21 N. Y. S. R. 429; *Sterling v. M. L. Ins. Co.*, 17 id. 694; *M. H. Bank v. Van Antwerp*, 21 id. 377; *Day v. Town of New Lots*, 107 N. Y. 148; *Manchester v. Tibbetts*, 19 N. Y. S. R. 299; *Foote v. Valentine*, 48 Hun, 475; *Gardiner v. Schwab*, 110 N. Y. 650; *Mullinhoff v. Scherer*, 15 Civ. Pro. Rep. 160; *Donohue v. Hammel*, 17 N. Y. S. R. 994; *Porter v. Smith*, 35 Hun, 118; 107 N. Y. 531; *Spencer v. Chambers*, 36 Hun, 193.) The defense that the Sea Cliff lots were taken and received in full payment of the \$3,000 for which the bonds were given, is inconsistent with the defense of compromise; the defendant elected to try the case on the former theory and waive the latter. No such question, therefore, can be raised on appeal. (*Nealan v. G. T. R. R. Co.*, 24 Wkly. Dig. 523, 525.) To make out the defense of payment in this case, the onus is upon the defendant to prove affirmatively that the lots were taken by Mrs. Miller under an express agreement that they should be received in actual full payment of the debt, but, instead of that being done, the evidence clearly establishes that the lots were not taken in full payment, and the referee has so found. (*K. Bank v. Gay*, 19 Barb. 459; *Crane v. McDonald*, 45 id. 354; *Noel v. Murray*, 13 N. Y. 167; *Foley v. Barber*, 5 Johns. 68; *Palmer v. Guersney*, 7 Wend. 248; *Claflin v. Ostrom*, 54 N. Y. 581, 585.) The instrument on which this action is founded is more than a guaranty, but, if it were not, we should still insist that this action is clearly maintainable. (*Allen v. Rightmere*, 20 Johns. 365; *Douglass v. Howland*, 24 Wend. 48, 49, 50; *Union*

Statement of case.

Bank v. Coster, 3 N. Y. 203 ; *Schulty v. Crane*, 6 Hun, 236 ; 64 N. Y. 659 ; *Claflin v. Ostrom*, 54 id. 581 ; *E. N. Bank v. Kaufman*, 93 id. 273 ; *Everson v. Gere*, 40 Hun, 248 ; *Arnot v. E. R. R.*, 67 N. Y. 315 ; *McLaren v. Watson*, 26 Wend. 425 ; *Gould v. Ellery*, 39 Barb. 163 ; *In re Blakely*, 27 Eng. L. & Eq. 280 ; *Wyke v. Rogers*, 12 id. 162 ; *Woodcock v. O. & W. R. R. Co.*, 21 id. 285 ; *Wright v. Stores*, 6 Bosw. 600 ; Bayliss on Sureties & Guar. 290 ; *Morgan v. Smith*, 70 N. Y. 537 ; *Culro v. Damies*, 73 id. 217 ; *Palmer v. Purdy*, 83 id. 144 ; *N. Bank v. Bigler*, Id. 51 ; *Hagey v. Hill*, 75 Penn. St. 109 ; *Underhill v. Palmer*, 10 Daly, 478 ; 50 N. Y. 375 ; 4 Johns. Ch. 131 ; 2 H. & W. L. C. 370 ; Brandt on Sureties, § 373 ; *People v. Lee*, 104 N. Y. 441 ; *C. M. L. Ins. Co. v. C., etc., R. R. Co.*, 41 Barb. 9 ; 22 How. Pr. 56 ; 24 Wend. 35 ; *W. & O. C. Ins. v. Blackmer*, 48 N. Y. 663 ; *Mead v. Parker*, 41 Hun, 577 ; *Milk v. Rich*, 15 id. 178 ; 80 N. Y. 27 ; *White v. Baxter*, 71 id. 255 ; *Diossy v. Morgan*, 74 id. 11 ; *Harrison v. Nilkin*, 69 id. 412 ; *P. C. Co. v. Blake*, 85 id. 226 ; *Enos v. Thomas*, 4 How. Pr. 49 ; *Winchell v. Doty*, 15 Hun. 1 ; *Hennandez v. Stillwell*, 7 Daly 360 ; *Tooker v. Winston*, 17 Wkly. Dig. 303 ; *Humfrey v. Hayes*, 94 N. Y. 594 ; *Hurd v. Callahan*, 9 Abb. [N. C.] 374 ; *Raynor v. Lanx*, 28 Hun, 35 ; *Herring v. Sanger*, 3 John. Cas. 71 ; *White v. Baxter*, 71 N. Y. 255.) A referee's refusal to find a fact as requested is not ground for exception where there is any conflict of evidence. (*Porter v. Carpenter*, 71 N. Y. 74 ; *Putnam v. Furman*, Id. 590 ; *Porter v. Smith*, 35 Hun, 118.) Death, pedigree, etc., may be proved by reputation. (*Stouvenwell v. Stevens*, 26 How. Pr. 244 ; *Jackson v. King*, 5 Cow. 239 ; *Russell v. Jackson*, 22 Wend. 277 ; *Jackson v. Bonehan*, 18 Johns. 37.) That the defendant cannot raise any question on appeal, which he has waived on the trial, is too well settled to require citation of authorities. (*Osgood v. Teale*, 60 N. Y. 475.) Rinehart having, for his own benefit, requested the surrender and cancellation of the bonds and the substitution of other security, and promised and agreed that, if that should be done, he would be responsible ;

Opinion of the Court, per GRAY, J.

and the request having been acted upon and complied with by the owner of the bonds, he cannot now claim that such surrender and cancellation was an extinguishment of the debt and relieved him from all liability. He is estopped from setting up any such defense. (*Jackson v. Parkhurst*, 9 Wend. 209; *C. C. Bk. v. Reilly*, 4 Den. 481; *Torey v. Bank of Orleans*, 9 Paige, 649; *Demeyer v. Legg*, 18 Barb. 14; *Dempsey v. Tyler*, 3 Duer, 73.)

G. H. Crawford for respondent. The defendant, being a guarantor, may stand upon the strict terms of his obligation. (*Ward v. Stahl*, 81 N. Y. 408; *People v. Chalmers*, 61 id. 351; *Miller v. Stewart*, 9 Wheat. 680; *Albany, etc., v. Dorr*, 1 Den. 268; *Ludlow v. Simond*, 2 Caines' Cas. in Error, 1.) After the execution and subsequent fulfillment of the agreement of February 18, 1880, the bondholders had no remedy against the Sea Cliff Association, even if the property received by them respectively should not realize the full amount of the bonds. (*Lainson v. Tremere*, 1 Ad. & Ell. 792; *Bourman v. Taylor*, 2 id. 278; *Wiles v. Woodward*, 5 Exch. 557; *Cutter v. Bowen*, 11 Q. B. 973; *Van Rensselaer v. Kearney*, 11 How. Pr. 323.) It is open to the respondent, in an appeal taken from an order granting a new trial upon stipulation, to urge errors of the Trial Court which were not noticed by the General Term. (*Mackay v. Lewis*, 73 N. Y. 382; *Godfrey v. Moses*, 66 id. 254; *Simon v. Canaday*, 53 id. 298; *People v. Lacoste*, 37 id. 192.)

GRAY, J. After much hesitation and with some degree of reluctance, I have come to the conclusion that this appeal cannot succeed. The question is, what was the obligation assumed by the defendant towards the holder of the bonds of the Sea Cliff Association, when he executed the instrument of February 18, 1880? That paper seems to introduce some doubt, and tends to confuse the mind, by the use of inapt words and by expressions which are certainly not calculated to make the meaning of the parties perfectly plain. It has frequently been said that our

Opinion of the Court, per GRAY, J.

language is lacking in precision; but that fault will not alone account for the way in which the draughtsman has in this writing succeeded in darkening its meaning and in contributing an element of uncertainty to its purpose. If there ever was a case where resort to extrinsic circumstances connected with its making was permissible, this is one. But when we come to consider what they were, I doubt if we are much better off in our understanding. What gave rise to this agreement of the defendant was the circumstance that Mrs. Miller, the holder of the bonds, refused to assent to any arrangement with the Sea Cliff Company, under which the bonds should be surrendered to it. That company was endeavoring to effect an adjustment of its affairs, through which it might rid its property of the lien of the mortgage securing these and other bonds. The defendant was an officer and was interested in the success of its efforts for an adjustment, but of the details of the arrangement for it he knew little, if anything. They were confided to a committee, agreed upon by the trustees of the association and the bondholders. A bondholders' meeting was called for the afternoon of February 18, 1880, at which a plan of settlement was to be presented in a sealed report. In order to induce Mrs. Miller to yield in her objections to the surrender of her bonds, the defendant made the agreement in question. At the time, she already held the defendant's obligation of November 21, 1876, guaranteeing to Wm. Miller, her predecessor in interest, the payment of the bonds. This was a clear and simple agreement of the defendant, by which he became at once liable to pay the amount of the bonds, if the obligor named failed in its obligation to the holder. And here we must notice that these bonds were originally acquired by purchase from the company. This is admitted by the pleadings; and they were not taken originally by the predecessor in interest of the plaintiffs as collateral security for an indebtedness of the company to him, as it seems to be suggested by the plaintiffs. Their purchase was induced by the defendant, and the above guaranty was then executed; defendant being interested in the projects of the company as promoter and

Opinion of the Court, per GRAY, J.

otherwise. So the question was, when the subsequent holder of the bonds was asked to give them up, how should she be further protected, as an inducement to do that? What plan of adjustment, which the bondholders would be requested to enter into, would be reported was not apparently definitely known by the parties, at any rate not by Mrs. Miller, and this ignorance might account for the indistinctness of the agreement made by the defendant with her in the morning before the bondholders' meeting. Its recitals comprehend the purpose of a release of the lien upon the company's land, and "the surrender and cancellation of the bonds and the substitution of other securities in the place thereof, to which the said D. B. Miller has consented and agreed." What the defendant then obligates himself to do is expressed as follows, viz. :

"In the event that any or all of the matters and things hereinbefore mentioned or referred to shall happen, or in case said bonds or my said guarantee shall be cancelled or destroyed, or otherwise disposed of, as required by said association hereafter, and in spite of and notwithstanding anything that may happen or be done at the request of said association, or in behalf thereof, my aforesaid guarantee of said bonds, and my obligation created and incurred by reason of said guarantee, shall remain in full character and effect; and this is hereby declared to be a continuing, running guarantee for the payment of said sum of three thousand dollars and interest (according to the original terms of said original guarantee) attached to and belonging to and guaranteeing any and all securities, acts and paper-writings and proceedings of said association in relation to the said D. B. Miller, and of its indebtedness to her, hereafter to be done, continued or made."

When that instrument was executed, what resulted? No change of position yet, but only the consent of Mrs. Miller to do the certain thing recited; namely, to take other securities in the place of her bonds. She had not bound herself to anything more. But did the defendant bind himself to any further extent than, at most, to agree that the company should

Opinion of the Court, per GRAY, J.

pay the indebtedness, which had been previously guaranteed by him? The only language, which might be deemed capable of the broadest meaning, is in the declaration that this guarantee attaches to and guarantees "any and all securities, acts, papers, writings and proceedings of said association in relation to the said D. B. Miller and of its indebtedness to her, hereafter to be done, etc." Now it must be conceded that everywhere in the paper the defendant binds himself to observe the first guaranty of payment of the bonds; and, in addition, to the payment of the indebtedness thus evidenced by them, in any other, or new, form and shape it might assume, in the stead of these particular bonds. We cannot say that, by this instrument, he put himself in the place of the debtor company and became the debtor; leaving the company freed. Neither the paper-writing, nor the subsequent acts of the parties, permit of our entertaining any such proposition. I concede the motives of the defendant to have been based on personal interest in the success of the adjustment scheme and that the legal adviser of the holder of the bonds tried by words and varied expressions to secure his client, by an agreement of the defendant. And he did so, in so far as it was an agreement that the company should pay its debt, however evidenced thereafter. Are we to assume from such language that the defendant ever said, or intended to do, more? Or that he would assume the whole debt himself? Clearly not, and the whole difficulty of the plaintiffs' case is just this, that they construe the defendant's agreement to be a raising of the debt from off of the company and its assumption by himself.

I think it perfectly clear that we cannot hold that agreement to import a greater obligation than that, whatever else might be offered to and accepted by the bondholder, in lieu of her bonds, and as representative of the indebtedness they evidenced, the defendant would guaranty the eventual payment of such indebtedness. It was an instrument of guaranty and nothing more. If so, then we cannot deny to the defendant the protection of the rule of law that his liability shall not be extended beyond the clear obligation of the agreement itself; though

Opinion of the Court, per GRAY, J.

we may be at liberty to inquire, in cases of doubt and ambiguity, as to the extent of ground covered by its terms. It is not his debt, the payment of which is being secured, but the debt of another, and strict construction of the promise is but a matter of legal right and of justice, which we cannot disregard. The holder of the bonds was quite at liberty to refuse to change her position of security and to give up her bonds, without that the company gave to her a security of some kind evidencing, or assuring its debt to her. She had not consented to forgive or release the debt, only to a change in the form of it. When, therefore, her legal adviser, as her agent, attended the bondholders' meeting, in the afternoon of the day when this guaranty was made, she was not bound to compromise her position towards the defendant by any such act as her attorney performed for her, in the signing of the bondholders' agreement. Client and attorney were chargeable with the legal import of the defendant's agreement, and, as well, with the legal effect of any contract with the company respecting her claims against it. The contract, which was executed between the company and the bondholders, involved the payment in full of its bonds, by the purchase therewith of a certain number of lots of land. Its only possible object was to discharge so much indebtedness as they represented, by the conveyance of lands at a price fixed as equivalent to the par of the bonds. Such a contract it was open to the bondholders to reject, or to make. Mrs. Miller could have declined to execute it, or to release to the company the indebtedness represented by the bonds, and she would have been as safe as ever she had been previously. But she bound herself to its terms, and when she got the lots, her claims against the company were extinguished. I cannot understand the proposition that, in such a transaction, where mortgaged premises are conveyed, in whole, or in part, for the release of the mortgage and the cancellation of the bonds, the land in any sense represents the original indebtedness, so as, if it subsequently sells at a less ratio of value than the par of the mortgage bonds, an agreement guaranteeing the full payment of the bonded indebtedness can be resorted to. I do not think

Statement of case.

that resort to extrinsic facts and circumstances can be allowed for the purpose of extending a promise of guaranty to an assurance of the sufficiency in value of what is taken in payment by the creditor. Very precise and unmistakable words would be needed to that end.

I see nothing more in the plaintiffs' claim. Their argument is that the defendant's agreement covered any deficiency towards the original claim, after the sale of the lots, which were taken, under the bondholders' agreement, for the bonds. The answer is that its language imports no such obligation, in terms express, or implied. By words and by expressions, the idea is made dominant that the company's existing indebtedness should be paid, no matter what the form it offered to evidence it in; but it did not bind the defendant in case that indebtedness was settled for. It did not bind him, if the company paid off its debt, so as to remain released to its creditors and to the world, to stand ready, if what was taken in payment failed, at some time in the near or remote future, to realize an amount equal to the original debt, to assume the deficiency.

I think the decision of the General Term was right and that its order should be affirmed, and, under the appellant's stipulation, judgment absolute should be rendered against them, with costs.

All concur, except EARL and PECKHAM, JJ., dissenting.

Order affirmed and judgment accordingly.

ROBERT SOLTAU, Respondent, v. OTTO GERDAU, Appellant.

The provisions of the "Factors Act" (Chap. 179, Laws of 1830), declaring that every factor or other agent intrusted with the possession of merchandise or the documentary evidence of title thereto "for the purpose of sale * * * shall be deemed to be the true owner, so far as to give validity to any contract made by such agent with any other person for the sale or disposition * * * of such merchandise," has no application when a factor or agent has obtained goods taken by a common-law larceny from the true owner.

Statement of case.

One S., a rubber broker, by means of false and fraudulent representations that he had effected a sale of a quantity of rubber for plaintiff, obtained from him a delivery order for the rubber, then on board of a steamboat, for the purpose of delivery to the alleged purchaser. By means of such order S. obtained possession of the rubber, stored it and took a warehouse receipt therefor in his own name, which he delivered to defendant to secure an advance, to be paid on sale of the rubber. Defendant sold, and after deducting the advance, paid over the balance to S. In an action to recover possession of the rubber, *held*, that S. obtained possession by a larceny; and so, that defendant acquired no title and was liable for a conversion.

Baines v. Swainson (4 B. & S. 270) and *Vickers v. Hertz* (L. R. [2 S. & D. App.] 113), distinguished.

Reported below, 48 Hun, 537.

(Argued January 24, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, in favor of plaintiffs, entered upon an order made May 22, 1888, which overruled defendant's exceptions and ordered judgment on a verdict directed by the court, exceptions having been ordered to be heard at first instance at General Term.

This action was brought by the plaintiff to recover the possession, or, in lieu thereof, the value of seventy-six baskets of prime Borneo rubber, F. F., alleged in the complaint to have wrongfully, unlawfully and illegally come into the possession of the defendant between July 1, and November 1, 1885, and to be wrongfully, unlawfully and illegally detained by the defendant from the plaintiff.

The answer of the defendant denies the alleged wrongful possession and detention of the rubber, and sets forth that he came into possession of it through one Henry A. Smith, a broker and dealer in rubber, doing business in the city of New York; that he made advances to him on the rubber on the security of warehouse receipts therefor, made out in his name under an agreement, that, when the market was favorable, or when so ordered, he was to sell the rubber for his account, deduct interest for the loan and a commission, and pay over the surplus to him; and that pursuant to such agreement he did subsequently sell the rubber,

Statement of case.

make the deductions agreed upon and pay over the surplus to him.

The action was brought to trial at a circuit, and the material facts there established are as follows: The plaintiff, an importer of rubber and gutta percha, imported on the steamer Canada, which arrived at New York, February 22, 1885, ninety-three baskets of rubber, of which the seventy-six baskets mentioned in the complaint were a part. Smith was a broker in India rubber and had previously acted as such for the plaintiff. Nearly two months prior to February, 1885, he had a conversation with the plaintiff in which he stated to him that he could sell ten tons of Borneo rubber at forty cents to the Goodrich Company, of Akron, Ohio, to which the plaintiff replied that he would sell them that amount and would cable for it. Thereupon Smith addressed a letter to the plaintiff under date of December 8, 1884, as follows: "Goodrich will take ten tons F. F. Borneo at forty cents, but will probably wait ninety days on half of it, or else have it delivered in two lots. Will arrange that later on. Send your cable to-night." On the next day Smith addressed another letter to the plaintiff as follows: "Letter and telegram just found on my return. Closed the Borneo for Goodrich forty cents, one-half commission. Best can do. Will call to-morrow." Thereupon the plaintiff cabled for the ten tons of rubber. Thereafter Smith delivered to the plaintiff the following contract dated December 7, 1884:

"Sold to THE B. F. GOODRICH Co., Akron, O.,

For account of ROBERT SOLTAU, Esq.,

H. A. SMITH. About twenty-two thousand (22,000 lbs.) of prime Borneo Rubber (mark F. F.) to be delivered during the first half of the month of March, 1885, @ 40c. per lb., half cash sixty days after delivery, and half cash 90 days after delivery.

H. A. SMITH,

Half brokerage, H. A. S. Broker in India Rubber,

No responsibility taken

17 William Street."

unless by special agreement.

Statement of case.

Soon after the arrival of the rubber on the steamer, the plaintiff gave to Smith, as broker, a delivery order therefor, addressed to the steamer company, as follows: "Please deliver to bearer, F. F., ninety-three baskets Borneo rubber, ex. Canada, arrived February 22, 1885." This order was given by the plaintiff to Smith for the sole purpose of enabling him to make delivery of the rubber to the Goodrich company, pursuant to the supposed contract contained in the bought note above set forth. After the delivery order was given to Smith he stated to the plaintiff that the rubber had in fact been shipped to the Goodrich company in fulfillment of the supposed contract of sale; but as matter of fact the alleged contract was a pure fabrication, he never having obtained any such contract or had any negotiations whatever for the sale of the rubber to the Goodrich company. He obtained possession of the rubber by means of the delivery order, and on March 2, 1885, without the knowledge of the plaintiff, he stored the same in the warehouse of Lawson B. Bell, 518 Washington street, New York, and he subsequently took out a negotiable warehouse receipt for it in his own name in the following form:

"No. A. 326.

NEW YORK, *May* 6, 1885.

LAWSON B. BELL.

Received on storage, in 516-18 Washington St.

From Mr. H. A. Smith, and deliverable only upon the return of this receipt, marked ex. S. S. Canada, March 2, '85, F. F. 76 baskets (76) seventy-six baskets rubber. Storage 4c. per month. Labor in and out, 4c.

Endorsed:

H. A. SMITH."

While the rubber was in Bell's warehouse, unknown to the plaintiff, Smith stated to him that the Goodrich company desired to return seventy-six of the ninety-three baskets of the rubber claimed to have been shipped to that company on the supposed contract, and thereupon the plaintiff instructed him to take them back. This he made a pretense of doing, and on April 23, 1885, he wrote a note to the plaintiff stating that he had secured the seventy-six baskets from the Goodrich company, and at the same time he sent to him a pretended contract of

Statement of case.

sale of the rubber to the Boston Rubber Shoe Company, as follows:

“Sold to Boston Rubber Shoe Co.,

H. A. SMITH.
For account of Robert Soltan, Esq., about five (5) tons of prime Borneo rubber, to be delivered at any time during month of July, 1885, at 43c. per lb. net, cash 30 days after delivery.

No responsibility taken unless by special agreement.

H. A. SMITH.”

Previous to the delivery of this contract of sale, and on or about April fifteenth, Smith had written to the plaintiff that the Boston Rubber Shoe Company would take 100 piculs, F. F. at forty-three cents, July delivery, about seven tons, and he wanted plaintiff to cable for it; but the plaintiff declined to do so and said he would send that rubber to the Boston company which the Goodrich company desired to return. But at this time there had not been, nor was there subsequently, any negotiations whatever between Smith and the Boston Rubber Shoe Company for the sale of the rubber. After sending this last mentioned contract to the plaintiff, Smith stated that he had the seventy-six baskets mentioned therein stored in the warehouse of E. E. Driggs in the name of the plaintiff. Plaintiff requested Smith to deliver to him the warehouse receipts for the same, but he made excuses and the pretended receipts were never delivered to the plaintiff, Smith during all the time having the rubber stored in his own name in Bell's warehouse. For the purpose of further concealing his conversion of the rubber, Smith got from the plaintiff, on or about June 29, 1885, a delivery order for the rubber, addressed to the warehouseman Driggs, with whom the plaintiff supposed the rubber to be stored in his (the plaintiff's) name, as follows: “Please deliver to bearer F. F. 76 baskets Borneo rubber and oblige, yours truly, Robert Soltan.” This delivery order was obtained on the pretense and for the sole purpose of making delivery of the seventy-six baskets of rubber to the Boston Rubber Shoe Company. On the seventh of May, Smith took the warehouse receipt received by him

Statement of case.

from Bell on the day previous to the defendant, and on the faith thereof received an advance of \$2,000 from him and delivered the receipt to him, with the understanding that the defendant might sell the rubber to reimburse himself and pay over the balance of the proceeds to Smith. Thereafter the defendant did sell the rubber, and after deducting the sum advanced by him and interest and commissions, he paid over the balance of the proceeds to Smith.

At the close of the evidence the court directed a verdict in favor of the plaintiff.

Theodore W. Dwight and *E. B. Convers* for appellant. The facts of the case appear to show that the plaintiff sold the rubber in question to Smith. In that view the defendant occupies the position of an ordinary purchaser for value and the plaintiff has no cause of action. (*Whitehead v. Tuckett*, 15 East. 400; *Pennell v. Alexander*, 3 Ell. & Bl. 283; L. J. [23 Q. B.] 172; Code Civ. Pro. § 449; *Considerant v. Brisbane*, 22 N. Y. 389; *Wetmore v. Hegeman*, 88 id. 69; *Cobb v. Knapp*, 71 id. 348; *Kernochan v. Murray*, 111 id. 306; *In re Westzinthus*, 5 B. & Ad. 817; *Spalding v. Ruding*, 6 Beav. 376; L. J. [15 Ch.] 374; Note to *Berndston v. Strong*, L. R. [4 Eq.] 486; *Kemp v. Falk*, 7 App. Cas. 573; Benjamin on Sales, 809, 810.) If there is no evidence of a sale to Smith, the only alternative view is that Smith acted as agent in some form for the plaintiff. In that character Smith had authority to transact the business in question with the defendant, and plaintiff cannot disavow Smith's acts, however wrongful in their own nature they may have been. (*Whitehead v. Tuckett*, 15 East. 400; Story on Agency, §§ 127, 131, 227, 444; 2 Kent's Comm. 620; *Baring v. Corrie*, 2 Barn. & Ald. 137; *Boysen v. Coles*, 6 M. & S. 14; *Moore v. Clementsen*, 2 Camp. 22; *Grant v. Norway*, 10 C. B. 665; *Armour v. M. C. R. R. Co.*, 65 N. Y. 111; *Bank of Batavia v. N. Y., L. E. & W. R. R. Co.*, 106 id. 195; *Campbell v. Wright*, 4 Burr. 2046; *Pickering v. Busk*, 15 East. 44; *McCombie v. Davis*, 7 id. 5; *N.*

Statement of case.

R. Bank v. Aymar, 3 Hill, 262; *Cooke v. Eshelby*, 12 App. Cas. 271; *Hogan v. Sher*, 24 Wend. 457; *Raybone v. Williams*, 7 T. R. 356, note *a*; *George v. Clagett*, Id. 355; 2 Smith's L. C. 77; *McLachlin v. Brett*, 105 N. Y. 391; *Boysen v. Coles*, 6 M. & S. 14; *Williams v. Barton*, 3 Bing. 139; 1 Parsons on Cont. 93; *M. S. Bank v. Gardner*, 15 Gray, 362; *M. & T. Ins. Co. v. Kizer*, 103 U. S. 352; *Gray v. Agnew*, 95 Ill. 315; 2 Kent's Comm. 625, 627; *Rodriguez v. Heffernan*, 5 Johns. Ch. 417.) Defendant is protected in making his advances by the so-called "Factors Act," and accordingly, under the facts appearing in this case, the plaintiff has no cause of action. (Laws of 1830, chap. 179; 4 R. S. 2517, 2518; *Cole v. N. Bank*, L. R. [10 C. P.] 354, 368, 369.) Smith in the present case was entrusted by the plaintiff with the warehouse receipts issued to him by Bell, since he was entrusted with the delivery order given to him by the plaintiff to obtain an unqualified possession of the goods. (*Cartwright v. Wilmerding*, 24 N. Y. 521.) Even if Smith was not sufficiently entrusted with the documents or other *indicia* of title, it certainly cannot be disputed that he was entrusted with the possession of the goods for the purpose of sale within the intent and meaning of the Factors Act, section 3. (*Howland v. Woodruff*, 60 N. Y. 73; *Pegram v. Carson*, 10 Bosw. 505; 24 N. Y. 521, 536, 537.) The defendant in this case acted in good faith in making his advances on the goods on the apparent ownership and authority of Smith to dispose of them. (*Voorhis v. Olmstead*, 66 N. Y. 113.) The facts of the case show beyond dispute the consent of the plaintiff to entrust Smith with the documentary evidence of title as well as with the possession for the purpose of sale. (*Kinsey v. Leggett*, 71 N. Y. 387; *Hazard v. Fiske*, 18 Hun, 277.) The rights of the defendant are not affected by the fact that Smith dealt with the plaintiff in a fraudulent manner, and that the contracts with Goodrich and the Boston Rubber Company had no existence and were purely mythical. (*Baines v. Swainson*, 4 B. & S. 270; L. J. [32 Q. B.] 281; *Vickers v. Hertz*, L. R. [2 H. L.] 113; *Sheppard v. U. Bank*, 7 H. &

Statement of case.

N. 60 ; *Hayman v. Flewker*, 13 C. B. [N. S.] 519 ; *Hellings v. Russell*, 33 L. T. 380 ; *Cole v. N. W. Bank*, L. R. [9 C. P.] 354 ; *Pickering v. Busk*, 15 East. 38 ; *Rodliff v. Dallinger*, 141 Mass. 1.) The cases in which the "Factors Act" does not protect the pledgee show by way of contrast that the case at bar does not fall within its protection. (*Cole v. N. Bank*, L. R. [9 C. P.] 354 ; 10 id. 354 ; *Hellings v. Russell*, 38 L. T. 380 ; *Stevens v. Wilson*, 512 ; 3 Denio, 472.) The fraud of Smith in inducing the plaintiff to give him the possession of the goods by the delivery order, does not prevent the pledge from being available to the defendant, on the theory that Smith's unlawful act was a statutory theft or larceny. (*Cundy v. Lindsay*, L. R. [3 App. Cas.] 459, 464 ; *Weaver v. Barden*, 49 N. Y. 286, 289 ; *Dustin v. Livingston*, 9 J. R. 96 ; *McNeil v. T. N. Bank*, 46 N. Y. 325 ; *Stevens v. Brennan*, 79 id. 254 ; *Bradlee v. Whitney*, 108 Penn. St. 362 ; *Dias v. Chickering*, 64 Md. 348 ; *Clafflin v. Cottman*, 77 Ind. 58 ; *Carrie v. Raub*, 100 id. 247 ; *Soulsby v. Nering*, 9 East. 310, 314 ; 24 & 25 Vict. chap. 96, § 100 ; *Bentley v. Vilmont*, L. R. [12 App. Cas.] 471-477 ; *Fitzgerald v. Quann*, 109 N. Y. 441 ; *People v. Palmer*, Id. 110 ; Penal Code, § 528 ; *Coal v. Smith*, 1 Black. 459 ; *Wood v. U. S.*, 16 Pet. 342 ; *Bower v. Lease*, 5 Hill, 221 ; *Lyddy v. Long Island City*, 104 N. Y. 218 ; *Kaltenbach v. Lewis*, L. R. [10 App. Cas.] 640.) The opinion of the General Term in the case at bar is founded on a misconception of the facts, and also, as far as its statements of the facts are correct, on erroneous views of the law, and should not be followed in this court. (*Ross v. People*, 5 Hill, 294 ; *Mowrey v. Walsh*, 8 Cow. 238 ; *Bassett v. Spofford*, 45 N. Y. 387 ; *Zink v. People*, 77 id. 114 ; *Thorne v. Turck*, 94 id. 90 ; *People v. Dumar*, 106 id. 507, 508 ; Penal Code, § 528 ; *Hugitt v. Masker*, L. R. [22 Q. B. Div.] 364, 365 ; L. J. [58 Q. B. Div.] 171, 172.) The judge at the circuit having erred in directing a verdict for the plaintiff, as well as refusing the request of the defendant to go to the jury under some one or more of the forms set forth in the case, the General Term should have reversed the judgment at circuit. For failure to do this their own judgment

Opinion of the Court, per EARL, J.

affirming that of the court below should be reversed. (*Hatfield v. Phillips*, 9 M. & W. 649; *Rodliff v. Dallinger*, 141 Mass. 1-6.)

Mark Cohn for respondent. There was no question of fact for submission to the jury, as the undisputed facts showed a clear case of larceny of the seventy-six baskets of rubber. (*Collins v. Ralli*, 20 Hun, 246; 85 N. Y. 637; *Hentz v. Miller*, 94 id. 64; *Bassett v. Spofford*, 45 id. 387.) As a question of law the case was properly disposed of by the learned court at circuit. (*Collins v. Ralli*, 20 Hun, 246; *Hentz v. Miller*, 94 N. Y. 64; *Smith v. People*, 53 id. 113.) The question raised by the defendant, for the first time on the argument at the General Term, that there is no evidence that the Goodrich contract was not a *bona fide* transaction, is not well taken. (*Cohn v. Goldman*, 76 N. Y. 284, 287; *Mead v. Shea*, 92 id. 122-127; *A. B. & C. Co. v. Pratt*, 10 Hun, 443, 444; *Thayer v. Marsh*, 75 N. Y. 340; *Coats v. F. N. Bk.*, 91 id. 20-31; *Osgood v. Toole*, 60 id. 475, 478, 479; *Fargo v. Davis*, 8 N. Y. S. R. 12; *Spikerman v. McChesney*, 20 id. 79; 111 N. Y. 686; *Genet v. City of Brooklyn*, 114 N. Y. 618; *Fell v. N. Y. L. Works*, 22 N. Y. S. R. 577; *Mullin-hoff v. Scherer*, 17 id. 387; *D. S. M. Co. v. Best*, 50 Hun, 76; *Gardiner v. Schwab*, 110 N. Y. 650; *Averill v. Ward*, 17 N. Y. S. R. 675.)

EARL, J. The trial judge held that the facts of the case showed that the broker Smith obtained the rubber from the plaintiff by larceny, and upon that ground directed the verdict. There were no disputed facts and we think the evidence so clearly established the larceny that there was nothing in reference thereto to submit to the jury. It is entirely clear that Smith intended from the beginning of his negotiations with the plaintiff in reference to the rubber, to steal it. No other conclusion or inference from the evidence is justifiable. The plaintiff did not intend to part with the title of the rubber to Smith, and at most intended that he should have possession of it for a special purpose. He meant only to part

Opinion of the Court, per EARL, J.

with the possession of the rubber to Smith that he might make delivery of it to the Goodrich company under the prior contract of sale, while Smith intended to steal the rubber; and thus the crime of larceny was committed. (*Bassett v. Spofford*, 45 N. Y. 387; *Loomis v. People*, 67 id. 322; *Thorne v. Turck*, 94 id. 90; *People v. Morse*, 99 id. 662; 2 Bishop on Cr. Law [7th ed.], §§ 799, etc.)

At the time the first delivery order was delivered to Smith, the property was legally in the possession of the plaintiff, and the moment Smith took it he became a trespasser, the theft was complete, and he could at once, without any demand, have been sued for the trespass. The title of the property and the right of possession remained in the plaintiff, and he was deprived of the actual possession thereof wholly by the trespass and theft. In the law he never consented to part with the possession of the property, and Smith never had possession thereof, rightfully or legally, for one moment. Nothing which subsequently occurred changed the character of Smith's possession. The subsequent delivery order which the plaintiff was induced to give to him, directed to Driggs in whose warehouse he falsely represented the rubber to be, had no effect whatever. It gave Smith no dominion or control of the rubber, and in no way divested the plaintiff of any control or possession thereof which he then had. It was absolutely nugatory for every purpose. The property had then for nearly two months been stored in the warehouse of Bell in Smith's own name, and the warehouse receipt had for nearly two months been pledged to the defendant. From the time Smith first took possession of the rubber, his possession, so far as he had any, was solely that of a thief, and the actual possession and control of the property was never thereafter restored to the plaintiff. The plaintiff must, therefore, be treated as having been deprived of his property by the common-law crime of larceny, and it follows that the thief could not, independently of the Factors Act, confer any title or right of any kind, as against the plaintiff, upon any other person. The defendant, therefore, got no right to this rubber

Opinion of the Court, per EARL, J.

and had no right to deal therewith, or dispose of the proceeds thereof in any way, and the plaintiff's recovery against him is unquestionably right, unless he is protected by the Factors Act.

It is provided in section 3 of the act, chapter 179 of the Laws of 1830, commonly called the Factors Act, as follows: "Every factor or other agent entrusted with the possession of any bill of lading, custom-house permit or warehouse keeper's receipt, for the delivery of any such merchandise, and every such factor or agent, not having the documentary evidence of title, who shall be entrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof." Statutes similar to this have for many years existed in England, and in most, if not all, the states of the union, and it has never yet been held, nor, so far as we can discover, claimed in any reported case that the Factors Act can have any operation whatever in the case of goods taken by a common-law larceny from the true owner. If the documents mentioned in the section quoted have been stolen from the owner, then it cannot be said that the thief was entrusted with their possession; and when a factor or agent obtains goods from the true owner by a common-law larceny, it cannot be said that he is entrusted with their possession for the purpose of sale. To bring the case within the section quoted, the factor or other agent must be consciously and voluntarily entrusted with the possession of the documents or merchandise, and the section can have no application whatever to a case where the documents or goods are taken by trespass or theft, and thus the possession of the factor or agent is, from the beginning, tortious, wrongful and unlawful.

The first section of the Factors Act provides as follows: "After this act shall take effect, every person in whose name any

Opinion of the Court, per EARL, J.

merchandise shall be shipped shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandise to a lien thereon," for any money advanced or negotiable security given, etc.; and yet, notwithstanding the broad and explicit language of this section, it was held in *Kinsey v. Leggett* (71 N. Y. 387) that it has no application to a case where the property has been wrongfully taken from the possession of the owner and then fraudulently appropriated, and that it applies only to cases where the shipment of the property is made with the consent of the real owner in the name of another, thus conferring upon the latter apparent ownership and right of control.

In *Howland v. Woodruff* (60 N. Y. 73), it was held that the Factors Act was intended for the protection of third parties who, in good faith and in ignorance of any defects of title, advance money or incur obligations upon the faith of merchandise and the apparent ownership thereof by factors or agents who have been entrusted by the owners with the possession of, or with the documentary evidence of title to property; that it is the act of the owner in thus conferring upon his factor the apparent ownership and right of disposal, together with the fact that an innocent third person has dealt with the latter in reliance thereon, that estops the former from following his property; but that in order to estop the owner, where the factor has not the documentary evidence of title, actual possession is required. In that case ALLEN, J., said: "It is the act of the owner in entrusting the factor with the possession of the goods, or the documentary evidence of ownership and right of disposal, in connection with the fact that innocent third persons deal with him on the faith of such apparent ownership, that estops the owner from following his property into the hands of *bona fide* vendees or pledgees, and gives the latter a better title than their vendor or pledgor had." The doctrine of estoppel has never been applied against an owner who has been deprived of his property by larceny. Judge ALLEN further said, that it was not the interest or the general scope of the act to deprive owners of their property without

Opinion of the Court, per EARL, J.

any fault or act of theirs, and that "the act was intended for the security of those who deal with a factor or agent in the belief that he is the true owner, and that belief must be induced by the act of the owner in entrusting the factor or agent with the apparent ownership." An owner who is deprived of his property by theft is guilty of no act upon which another has the right to rely, and cannot in law be said to entrust the thief with his property.)

The case of *Collins v. Ralli* (20 Hun, 246), affirmed in this court (85 N. Y. 637) upon the opinion delivered in the Supreme Court, is entirely analagous to this, and is a very precise authority for the conclusion we have reached. There H. M. Cutler, a cotton broker, called upon the plaintiff and, by falsely and fraudulently representing that he was authorized to purchase cotton for certain mills in Massachusetts, induced the plaintiff to sell certain cotton to the mills and deliver to him a bill of sale thereof to the mills. Upon the representation that he desired to ship the cotton immediately, Cutler procured from the plaintiff a delivery order upon the warehouseman, at whose warehouse Cutler had the cotton weighed and marked and loaded upon a truck. Subsequently Cutler stored the cotton in another warehouse and took out receipts therefor from the keeper of such warehouse in his own name first, and afterwards in the name of his brokers. Thereafter the defendants purchased the cotton in good faith, and for value, through their brokers, receiving the warehouse receipts therefor, and subsequently shipped it to Liverpool. Cutler having absconded without paying for the cotton, the plaintiff brought the action against the defendants to recover the value of the cotton received and converted by them; and it was held that Cutler was guilty of larceny in fraudulently obtaining the temporary custody of the cotton, and thereafter converting it to his own use, and that the defendants acquired no title to it by reason of his transfer of it to them; that, as the plaintiff had merely entrusted Cutler with the temporary possession of the cotton, to enable him to weigh and cart it for shipment to the pre-

Opinion of the Court, per EARL, J.

tended purchasers, and had never conferred upon him the apparent title thereto, or any authority to dispose thereof, he was not estopped from reclaiming it from the defendants though they had purchased it in good faith; that the defendants were not protected by section 6 of chapter 326 of the Laws of 1858, providing that warehouse receipts may be transferred by indorsement, and that any person to whom the same may be transferred shall be deemed and taken to be the true owner of the goods therein specified, so far as to give validity to any pledge, lien or transfer made or created by such person or persons, as such provision only applies to receipts given for goods stored or deposited by persons having the title thereof, whether real or apparent, or authority so to do from such real or apparent owner. There, as here, the broker pretending that he had effected a sale of the goods, obtained a delivery order from the plaintiff, and, thus having obtained possession of the goods, stored the same in his own name, and thereafter sold them to a *bona fide* purchaser. That case was subsequently followed by *Hentz v. Miller* (94 N. Y. 64), growing out of the misconduct of the same broker. The learned counsel for the defendant has attempted to distinguish those cases from this. His attempted distinctions are very ingenious, but we fail to find any distinction in principle between them and this case.

The decision of this case could, we think, be put upon a narrower ground than the one upon which we have thus far placed it. The delivery order given by the plaintiff to Smith, that he might make delivery of the rubber to the Goodrich company, was not, within the meaning of the Factors Act, documentary evidence of title. It was not a bill of lading, custom-house permit or warehouse keeper's receipt. It was no evidence whatever of title, and whatever it was it was not seen by the defendants and they did not act on the faith thereof. Nor was Smith entrusted with the possession of the rubber "for the purpose of sale." So far as the plaintiff entrusted him with the possession, it was simply that he might make delivery of the rubber in pursuance of the contract of sale which he pretended he had nearly three months previously obtained.

Opinion of the Court, per EARL, J.

There is, therefore, no aspect of this case, either at common law or under the Factors Act, from which it can be said that the defendant obtained any title whatever to the property of the plaintiff.

The learned counsel for the appellant, in his argument, places great reliance upon the case of *Baines v. Swainson* (4 B. & S. 270). There the plaintiffs, cloth manufacturers, were applied to by one Ernsley, who was a factor and commission agent, for a sample of their cloths, on the representation that he could get them a purchaser. The samples having been sent, Ernsley afterward told the plaintiffs that he had got them an order for a certain number of ends at a stated price. The plaintiffs required to know the purchasers, and, Sykes & Son being mentioned, they sent the goods to the warehouse of Ernsley, who was to pass them on to Sykes & Son after seeing the process of perching performed upon them, for which he was to receive a commission from plaintiffs of one shilling per end. Ernsley had no authority from Sykes & Son, and he sold the goods to the defendants, who were cloth merchants, and bought them *bona fide*; and it was held per WIGHTMAN and CROMPTON, JJ., that Ernsley was an agent "entrusted" with the cloths within the meaning of the Factors Act (6 G., 4 C., 94, § 4, and 5 & 6 Vict. chap. 39, § 4), and that consequently the purchase of them from Ernsley by the defendants was protected; and per BLACKBURN, J., that Ernsley being in possession of the goods was, according to the statutes (5 & 6 Vict. chap. 39, § 4), to be taken to be "entrusted" with them by the owner, unless the contrary was shown, and that was a question for the jury. Under those statutes, to bring a transaction within their provisions, it was not necessary that the goods should be entrusted to an agent for sale, but it was sufficient if there was any mercantile agency; and if the goods were entrusted to a person whose business it was to deal in goods and make sales of them, he was such an agent as was contemplated by the statutes, although they were not entrusted to him for sale. Our Factors Act is different. In order to bring a case within it,

Opinion of the Court, per EARL, J.

it must appear that the goods were entrusted to an agent for sale, and it is not sufficient that they were entrusted to a mere commercial agent, or to one whose business it was to make sales of goods. Our statute contemplates the act of the owner in voluntarily and specifically entrusting the goods to some factor or agent for sale, and to no other agent and for no other purpose. It is by no means certain that that case would have been decided the same way if the English Factors Act had been like ours. That case is further distinguished from this in that there was no claim made there that the goods had been obtained by Ernsley from the plaintiffs by larceny, and the question of larceny received no consideration. So, while that case bears some analogy to this we do not consider it of controlling weight. The case of *Vickers v. Hertz* (L. R. 2 S. & D. App. 113) is also clearly distinguishable from this. There Vickers ordered 800 tons of pig iron from the Carron company, and, while they held it at his disposal, he employed Campbell Bros. to sell it for him. They wrote to him: "We can now get your price." He agreed, and sent them an order in the following terms: "To the Carron company. Please deliver to Messrs. Campbell Bros." Campbell Bros., instead of employing the document for the purpose of giving delivery to the supposed purchaser, represented the iron as their own, and asked Hertz to make them an advance upon it. Hertz declined until the document should be stamped and a place of delivery inserted by Vickers. These requirements having been satisfied by Vickers, the Carron company wrote to Hertz saying: "We have placed the pig iron indorsed by Thomas Vickers, Esq., to your credit." Hertz thereupon advanced to Campbell Bros. £2,400. The act of Campbell Bros. was a gross fraud upon Vickers, who knew nothing of the transfer to Hertz, although he had unsuspectingly facilitated its accomplishment. Campbell Bros., having become bankrupt, disappeared, and an action was brought by Vickers against Hertz for a delivery of the iron. The defense was that the iron had been acquired by Hertz legitimately under an order indorsed by

Opinion of the Court, per EARL, J.

Vickers and delivered by his factors to Hertz, who afterward sold it for less than he had advanced upon it. Judgment was given in favor of the defendant in that case, which upon appeal was affirmed. There was no question of larceny considered. That case was decided under 5 and 6 Victoria, chapter 39, in the 3d section of which it is provided, that "any agent entrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien or security, *bona fide* made by any person with such agent so entrusted;" and in section 4 of which it is provided "that any order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, shall be deemed and taken to be a document of title within the meaning of this act;" and it was held there that the delivery order given by the plaintiff to Campbell Bros. was a document of title within the express and plain meaning of the act, and that, therefore, the defendant, a purchaser from them, was protected.

It is not very profitable to enquire what would have been the position and rights of these parties if the sales pretended to have been made by Smith had been real, or, if the rubber had been, by the delivery orders, placed in his hands for sale on behalf of the plaintiff, an undisclosed principal. The pretended sales, and all the other pretences of Smith, were mere shams — devices used by him to accomplish the larceny, and the fact of larceny must dominate this case. The rubber was never in his possession for sale. Six weeks before it arrived in this country he had, as a broker, made the pretended sale to the Goodrich company, and, after its arrival, he obtained the delivery order, not to make a sale, but to make a delivery of the rubber upon a contract, which, if real, was previously binding upon the parties thereto.

But, if the pretended contract of sale to the Goodrich company had been real, and the plaintiff had given to Smith the delivery order to enable him to obtain possession of the rubber

Opinion of the Court, per EARL, J.

for delivery upon the contract, this action would still be undefended. In that case, if he obtained the delivery order with the preconceived design to convert the rubber to his own use, he would have been guilty of larceny with the effect and disability above mentioned. If he conceived the design to appropriate the rubber to his own use after it came into his possession, he would not have been guilty of larceny, but would still have been unable to confer any title thereto upon the defendant. Then he would have had possession of the rubber for the sole purpose of making delivery thereof upon a real contract and he would have had the mere possession thereof and nothing else. He would have been clothed with no *indicia* of title and with no apparent right to sell. While mere possession of goods is frequently *prima facie* evidence of title, it is merely *prima facie*. Whoever deals with the possessor, does it at his peril, and a purchaser from one having no other apparent title to goods than the possession thereof must see to it that his seller has the title; and if his title fails, and he is obliged to respond to the true owner of the goods, his loss is due to his own misplaced confidence, and not to that of the owner. Owners of goods, for commercial and other purposes, must, frequently, entrust others with the possession of them, and the affairs of men could not be conducted unless they could do so with safety. So long as the possession of the goods is not accompanied with some *indicia* of ownership, or of right to sell, the possessor has no more power to divest the owner of his title, or to affect it, than a mere thief. Here the defendant could have inquired into the title of Smith before he took the rubber in pledge, and his loss is due not to any wrong, neglect or misplaced confidence of the plaintiff, but to his own neglect and abused confidence. Smith having received the goods for delivery to the Goodrich company could no more pledge them than a common carrier, a depositary, a bailee to do some work upon them, or a mere servant. He had no general agency, but his power was limited to the special purpose for which the rubber was given into his possession. A valid contract of sale having been made bind-

Opinion of the Court, per EARL, J.

ing upon the plaintiff, he was not bound to make delivery through his broker, but he could have delivered the rubber through any other agent; and no one will claim that if the rubber had been put into the possession of a mere agent (not the broker) for delivery, a purchase from such agent would have divested the plaintiff of his title.

A little more may be said to show that Smith obtained no title to the rubber. There is no real evidence that it was intended by him or the plaintiff that he should have the title. He solicited of the plaintiff the right to act as his broker. He delivered to the plaintiff a bought note showing that the rubber was sold in his name and as his property; and if the transaction had been real he would, according to the previous custom and his understanding with the plaintiff, have given the purchaser a sold note indicating a sale on account of his principal without writing therein the principal's name. Thus he would have brought the seller and buyer together, and would have made a contract of sale binding upon them, incurring no responsibility himself but that of broker. (*Southwell v. Bowditch*, L. R. [1 C. P. Div.] 374). He obtained the delivery order, not to deliver rubber upon his contract, but upon plaintiff's contract. He consulted the plaintiff about taking the rubber back from the Goodrich company, and obtained his consent therefor. He subsequently professed to store it in plaintiff's name, and at all times subsequently professed to the plaintiff to deal with and treat it as his. Clearly, beyond any question, the plaintiff and Smith understood that the title to the rubber was in the plaintiff and never in Smith; and without the intention of one or both of them it could not pass from the plaintiff to Smith. The entries upon the plaintiff's books in reference to the rubber were mere matters of bookkeeping, having no reference to the title to the rubber, but merely to the proceeds which were expected to reach plaintiff's hands through Smith as his broker.

We have given careful attention to the exhaustive and learned brief of the counsel for the defendant, and while this case is not free from some difficulty, we are constrained to hold

Statement of case.

that it was properly disposed of below, and that the judgment there should be affirmed, with costs.

All concur, on the ground that there was a common-law larceny, except RUGER, Ch. J., PECKHAM and GRAY, JJ., dissenting.

Judgment affirmed.

S. SKIDDY COCHRAN et al., Respondents, v. WILLIAM A. WIECHERS, Impleaded, etc., Appellant.

119	399
148	28
119	399
155	151

Under the provision of the act of 1875, providing for the organization of certain business corporations (§ 37, chap. 611, Laws of 1875), which makes the stockholders "in limited liability companies" individually liable "to an amount equal to the amount of stock held by them respectively" for all the debts of the company, until the whole amount of capital stock has been paid in and a certificate thereof made and recorded, the liability so imposed is not penal, but is in the nature of a contract obligation, and so it survives the death of a stockholder, and continues against his personal representatives. The statutory obligation which the stockholder assumes when he becomes such, is inherent in, and becomes part of every contract made by the corporation with the creditors prior to the time that the certificate required is filed.

(Argued January 27, 1890 ; decided February 25, 1890.)

APPEAL from an order of the General Term of the Supreme Court in the first judicial department, made July 9, 1889, which reversed an order of Special Term, denying a motion to revive an action against the executors of the defendant William A. Wiechers, and granted the motion.

The nature of the action and the material facts are stated in the opinion.

Henry Schmitt for appellants. The cause of action set out in the complaint does not survive against the executors of Wiechers. (Laws of 1875, chap. 611, § 37.) This action, so far as it affects Wiechers, is a penal action. (*Bank of California v. Collins*, 5 Hun, 209 ; *Easterly v. Barber*, 65 N. Y. 252, 255 ; *Reynolds v. Mason*, 54 How. Pr. 213 ; *Stokes v. Stickney*, 96 N. Y. 323 ; *State v. Starkweather*, 8 J. & S. 460 ;

Opinion of the Court, per O'BRIEN, J.

Abb. Dig. 79 ; Wait on Insol. Corp. § 565 ; *Irvine v. McKean*, 23 Cal. 472 ; *Errickson v. Nesmith*, 86 Mass. 233 ; *Halsey v. McClean*, 94 id. 442 ; *Andrews v. Callander*, 30 id. 490 ; *Ripley v. Sampson*, 27 id. 372 ; *Dane v. D. M. Co.*, 80 id. 488 ; *Vincent v. Sands*, 42 Abb. Pr. 235 ; *Gregory v. G. Bank*, 3 Col. 332 ; *V. W. P. Co. v. Beecher*, 26 Hun, 52.) There is no authority in this state that holds that, on the same facts as those of the case at bar, the liability sought to be enforced is not in the nature of a penalty. (*Jessup v. Carnegie*, 80 N. Y. 441.)

Henry D. Hotchkiss, for respondents. There are two distinct liabilities of the stockholders set forth in the complaint, and both causes of action survive. (*Bartlett v. Drew*, 57 N. Y. 587 ; *Bogardus v. R. M. Co.*, 7 id. 147 ; Cook on Stockholders, § 218 ; 77 N. Y. 33 ; *Corning v. McCullough*, 1 id. 47 ; *Story v. Furman*, 25 id. 214 ; *Lowry v. Inman*, 46 id. 119 ; *Wiles v. Suydam*, 64 id. 173 ; *Flash v. Conn.*, 109 U. S. 371.) The liability is not penal, but is one on contract, and so survives as against representatives of a deceased stockholder. (*Bailey v. Hollister*, 26 N. Y. 112 ; *Chase v. Lord*, 77 id. 1 ; 6 Abb. [N. C.] 258 ; *Richmonds v. Irons*, 121 U. S. 27.) The fact that the action of *Reid v. Wiechers* is pending does not affect the present case. (*Pfohl v. Simpson*, 74 N. Y. 137.)

O'BRIEN, J. The plaintiffs are judgment creditors of the American Opera Company, Limited, a domestic corporation formed under chapter 611 of the Laws of 1875, for the incorporation of business corporations with limited liability. The capital stock of the company was fixed at \$500,000, only \$148,000 of which was ever paid in, and no certificate that the capital stock had been paid in has ever been made or recorded as prescribed by the statute under which the company was incorporated.

The plaintiffs' action is in the nature of a creditor's suit to settle the affairs of the American Opera Company, Limited, and distribute its assets, as well as the proceeds of the stock-

Opinion of the Court, per O'BRIEN, J.

holders individual liability among the company's creditors. (*Pfohl v. Simpson*, 74 N. Y. 137.) The complaint alleges the incorporation of the company, the amount of its capital stock, the amount paid in as above stated, and the fact that no certificate of the company had been made or filed as required by the statute.

Numerous persons have been joined as defendants with the opera company, as to whom it is alleged that they are either creditors or stockholders of the company, and among these William A. Wiechers was named as a defendant, as to whom it was claimed that he was a stockholder holding twenty-five shares of the stock of the company. It is also alleged in the complaint that several of the parties defendant, who were stockholders, were indebted to the company for their stock. This allegation is general, and the particular persons claimed to be so indebted are not named. Wiechers was served with the complaint and appeared and answered. On or about December 14, 1888, he died, leaving a last will and testament wherein he appointed executors. The will has been admitted to probate by the surrogate of New York county, and letters testamentary issued to the executors who have qualified and taken upon themselves the execution of the trust.

After the death of Wiechers the plaintiffs applied to the Special Term to revive and continue the action against the executors, and the Special Term denied the motion, upon the ground that the cause of action stated in the complaint against the deceased was of a penal character and did not survive. Upon appeal to the General Term from this order it was reversed and the court directed that the action be revived and continued against the executors of Wiechers, and that the plaintiffs have leave to serve a supplemental summons and complaint on the executors. From the order of reversal the executors have appealed to this court.

The cause of action stated in the complaint against the stockholders is two fold. First, it is alleged that many of them are indebted to the company for their capital stock, and second, that as the capital stock was never fully paid in and

Opinion of the Court, per O'BRIEN, J.

no certificate thereof ever made or filed, the defendants who were stockholders are liable for its debts to the extent of their stock. The question is whether a liability of this character on the part of a stockholder to the creditors of a corporation survives.

If the liability is penal in its nature it is conceded that it does not survive, while if the liability is in the nature of a contract obligation it is conceded that it does.

The provisions of the statute of 1875 upon which this action is based, so far as the stockholders are concerned, is as follows: "In limited liability companies all the stockholders shall be severally and individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company has been paid in, and a certificate thereof has been made and recorded as hereinafter prescribed."

We think the liability created by this statute survived the death of the stockholder and continues against the executors.

It is not like the liability of a trustee for neglecting to make a report, or for declaring dividends out of capital stock, or acts of a kindred character. These are breaches of duty on the part of the managing agents of the corporation for which the statute has made them liable, and this liability cannot be said to rest upon or grow out of a contract. The liability of a stockholder in the present case is different. Upon becoming the owner of the stock he voluntarily assumes the obligations imposed by the statute, and the creditors of the corporation who trust it, may be said to do so upon the faith of the statute which is part of the contract. The statutory obligation is inherent in and forms a part of every contract that the corporation makes with creditors prior to the time that the certificate required by the statute is filed.

In *Lowry v. Inman* (46 N. Y. 119), ALLEN, J., stated the principle (125, 126), as follows: "A personal liability of stockholders for the debts of a corporation, in virtue of the

Opinion of the Court, per O'BRIEN, J.

charter, is not in the nature of a penalty or forfeiture, and does not exist solely as a liability imposed by statute. It is not enforced simply as a statutory obligation, but is regarded as voluntarily assumed by the act of becoming a stockholder. By such acts he assents to be bound, or that his property shall be charged with debts of the corporation, to the extent and in the manner prescribed by the act of incorporation."

In *Wiles v. Suydam* (64 N. Y. 173) it was sought to hold the defendant, as a stockholder in a manufacturing company, on his liability under section 10 of the act of 1848, chapter 40, a section which, in substance, is almost identical with the one now under consideration, and also, as a trustee, on his liability for all the debts, because of a failure to file a report. A demurrer on the ground of the improper joinder of causes of action was sustained. The court, distinguishing between the two kinds of liability, said (CHURCH, Ch. J.): "The cause of action against the defendant as a stockholder consists of the debt and the liability created by statute against stockholders when the stock has not been paid in and a certificate of that fact recorded. * * * The first cause of action against the defendant as a stockholder is an action on contract. The six years' statute of limitations applies. The defendant is entitled to contribution."

The liability of Wiechers, therefore, being in the nature of a contract obligation, it survived his death, and the action can be continued against his personal representatives.

In *Bailey v. Hollister* (26 N. Y. 112) the court expressly recognized this principle. GOULD, J., said: "It will be conceded that when a stockholder in any corporation dies, his estate succeeds him in the title to, and the rights in, the stock he held. Of necessity, it must take that title and those rights subject to any liability then existing upon them; and so long as the estate is, by operation of law, the holder of such stock, it must become responsible for any obligations accruing during that time which the law may impose upon any holder of the stock as such. Such liability proceeds, not from any new contract made by or on behalf of the estate, but is

Statement of case.

inherent in the property itself. * * * Or, calling it a contract liability, it arises out of a contract made by the stockholder, and binding his personal representatives as it bound him, as long as the relation of stockholder existed."

The liability of the estate of the deceased stockholder under the statute is so well established, upon principle and authority, that further discussion is unnecessary. (*Chase v Lord*, 77 N. Y. 1; *Flash v. Conn*, 109 U. S. 371; *Richmond v. Irons*, 121 id. 27.)

The order of the Special Term denying the motion to revive and continue the action against the executors was properly reversed by the General Term, and its order of reversal should be affirmed, with costs.

All concur.

Order affirmed.

WILLIAM J. W. FINLAY, Appellant, v. RICHARD B. CHAPMAN,
Respondent.

The granting or withholding of an order of discovery, is a matter within the discretion of the Supreme Court, and its decision, based upon the merits of the application, is not reviewable here.

(Argued January 27, 1890; decided February 25, 1890.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made September 9, 1889, which affirmed an order of Special Term denying an application by plaintiff for the inspection of defendant's private books of account.

The material facts are stated in the opinion.

Louis Hasbrouck for appellant. The plaintiff's right to a discovery and inspection of the defendant's books and papers is based on the fact that the plaintiff is a *cestui que trust* seeking to compel his trustee to account for the trust estate. In such cases the *cestui que trust* has the right to an inspection of all books of the trustee, which refer to the trust, even though

Statement of case.

they be the private books of the trustee. (Perry on Trusts [3d ed.], §§ 821, 822; 2 Lewin on Trusts, 860; Story on Equity, §§ 462, 465; *Manley v. Brownley*, 11 Abb. [N. C.] 123; *Duff v. Hutchinson*, 19 Wkly. Dig. 20; *Martine v. Albro*, 26 Hun, 559; *Zimmerman v. Dieckerhoff*, 12 N. Y. S. R. 613; *Ahlymeyer v. Healy*, Id. 677; *Lefferts v. Brampton*, 24 How. Pr. 257.) It may be said that the production and discovery of these books cannot be compelled, because they would tend to convict the defendant Chapman of a crime, and are, therefore, privileged. But this objection is not sound. (*Duff v. Hutchinson*, 19 Wkly. Dig. 20.)

John M. Kellogg for respondent. The Court of Appeals will not review an order of the General Term resting in discretion. (Code Civ. Pro. § 190, subd. 2; *Cunard v. Francklyn*, 111 N. Y. 511; *Clyde v. Rogers*, 87 id. 623; *Stillwell v. Priest*, 85 id. 649; *Livermore v. Bainbridge*, 56 id. 72; *Glenney v. Stedwell*, 64 id. 120; *Howell v. Mills*, 53 id. 322; *Mills v. Davis*, Id. 349; *Jenkins v. Putnam*, 106 id. 272, 276; Code Civ. Pro. §§ 803, 804, 805, 807, 873.) The books must be shown to contain material evidence. (*Brownell v. Nat. Bank*, 20 Hun, 517; *Davis v. Dunham*, 13 How. Pr. 425; *Muller v. Levy*, 62 Hun, 123; *Churchman v. Merritt*, 51 id. 375; *G. C. M. Co. v. Sutro*, 24 N. Y. S. R. 1005; *Walker v. G. Bank*, 45 Barb. 39; *Mott v. C. I. Co.*, 52 How. Pr. 148; *Stichter v. Tillinghast*, 43 Hun, 95; *W. C. S. Bank v. Breckett*, 31 Hun, 435; *Crook v. Corbin*, 23 id. 176; *Beach v. Mayor, etc.*, 14 id. 79; *Merguelle v. C. Bank*, 7 Robt. 77; *Cassord v. Hinman*, 6 Duer, 695; *B. Ins. Co. v. Pierce*, 7 Hun, 236; *N. E. I. Co. v. N. Y. L. & T. Co.*, 55 How. Pr. 351; *Chapin v. Thompson*, 16 Hun, 329; *McAllister v. Pond*, 15 How. Pr. 299; Code Civ. Pro. § 803.) The executor paid to the estate full legal interest upon all advances taken by him, and the principal has been fully repaid. Plaintiff can gain no benefit from the use of such moneys in any event, unless he shows affirmatively that greater profits than legal interest were received. (*Muller v. Levy*, 52 Hun, 123.) R. B. Chapman, the debts of

Statement of case.

the estate being paid, had the right under the will to take payments or advancements on his share of the estate. He owned one-half of the estate, was the party to make the divisions and had the power to make them from time to time, and he used only his own money. (*Palmer v. Kingsford*, 112 N. Y. 337, 352, 353, 354; *Morris v. Kent*, 2 Ed. Ch. 175; *Redfield on Surrogates* [2d. ed.], 434; *Livingstone v. Newkirk*, 3 Johns. Ch. 312; 2 *Redfield on Wills*, 116, 120, 121; *Clark v. Tufts*, 5 Pick. 337; *Wheelwright v. Wheelwright*, 2 Red. Sr. Pr. 500; *Spruill v. Cannon*, 2 Dev. & B. Eq. Cas. 400; 4 Paige, 110.) The general guardian of the infants assented to and was a party to the advances or so-called loans. The act was not unlawful, as no better security could be obtained, and it was beneficial to the estate. The guardian had power, under the circumstances, to assent and agree to the acts, and the settlements, with him and between him and his wards are binding, especially after the elapse of about twenty years since the settlements. (*Mill v. Hoffman*, 92 N. Y. 182; *Story v. Dayton*, 22 Hun, 450; *In re Hynes*, 105 N. Y. 560; *Butterfield v. Cowing*, 112 id. 486; *Wuestoff v. G. L. Ins. Co.*, 107 id. 580; *Chapman v. Tibbitts*, 33 id. 289; *Crab v. Young*, 92 id. 66; *In re Niles*, 113 id. 547, 556, 558.) The settlements and decrees before the surrogate are a final determination and conclusive evidence that the defendant has been charged with all the interest he should be charged with, and while they stand are a bar to questioning the matters settled by them. (Code Civ. Pro. § 2742; 2 R. S. 94, § 65; *Stiles v. Burch*, 5 Paige Ch. 132; *Denton v. Sanford*, 103 N. Y. 607; *Brown v. Brown*, 52 Barb. 217; *In re Hawley*, 100 N. Y. 206; *In re Tilden*, 98 id. 435; *Hilland v. Baxter*, 98 id. 614; *In re Hood*, 90 id. 514; *Ellsworth v. Hinton*, 47 Hun, 625; *Dayton's Sur. Prac.* 543, 544; *Pomeroy's Eq. Jur.* § 820.) All of the said alleged loans or advances took place more than ten years prior to the commencement of this action, except two items, and the use which was made of those items was proved by the plaintiff, by the witness Frank Chapman, and the evidence shows no profits derived from them. The Statute of

Opinion of the Court, per O'BRIEN, J.

Limitations is pleaded in the answer. (*Hubbell v. Medbury*, 53 N. Y. 100; *Price v. Mulford*, 107 id. 305; *Lammier v. Stoddard*, 103 id. 672; *Carr v. Thompson*, 87 id. 160; *Harrington v. E. C. S. Bank*, 101 id. 257; Angell on Lim. §§ 25, 187; Pomeroy's Eq. Jur. § 820; *In re Niles*, 113 N. Y. 549, 556-558; 1 Story's Eq. Juris. § 64; 2 id., § 1520; Kerr on Fraud & Mistake, 303-312; Lewin on Trusts, 495, § 12; 95 U. S. 160; 15 Fed. Rep. 753; *Baker v. Read*, 18 Beav. 398; *In re Lord*, 78 N. Y. 109.) The books are privileged and the court should not compel an inspection of them. The plaintiff seeks a forfeiture of defendant's property and office. (Code Civ. Pro. § 837; *Andrews v. Prince*, 31 Hun, 33; *Y. T. Co. v. Brown*, 27 id. 248; *Anable v. Anable*, 24 How. Pr. 92; *Opdyke v. Marble*, 44 Barb. 64; *Byass v. Sullivan*, 21 How. Pr. 50.) Courts will regard trustees leniently when it appears they have acted in good faith, and if no improper motive can be attributed to them the courts have even excused an apparent breach of trust unless the negligence is very great. (*Crabb v. Young*, 92 N. Y. 66.)

O'BRIEN, J. This action is brought by the plaintiff as assignee of a residuary legatee and devisee of Augustus Chapman, deceased, against the defendant Richard B. Chapman, as the sole surviving executor and trustee under the will, to set aside certain conveyances of real property belonging to the estate, alleged in the complaint to have been fraudulent, and for an accounting of the profits and use of the estate moneys, and for other purposes, the action being very broad in its general scope and purpose.

After issue joined, the case was referred and partially tried. During the trial the defendant became seriously ill, and it is alleged and seems to be conceded by both parties that there is no hope of examining him further as a witness. But the general account-books and bank pass-book in which the defendant kept the accounts relating to the estate of which he was the executor seems to have been produced upon the trial, and an examination of their contents made on the part of the plaintiff.

Statement of case.

After the illness of the defendant, the plaintiff made an application at Special Term to compel the defendant to produce and discover to the plaintiff certain of his individual and private books of account, demanding that the court order them to be delivered to a referee with the right to the plaintiff to inspect the same and take copies thereof. On the part of the defendant, affidavits were read at the Special Term whereby it was attempted to show that the discovery was unreasonable or unnecessary. After hearing the parties the Special Term denied the application and, the order having been affirmed by the General Term, the plaintiff appeals to this court.

Whether the application ought to have been granted rested in the sound discretion of the court at Special Term. The General Term had power to review the exercise of that discretion, and to reverse the order if it was of the opinion that the merits of the motion were of such a character as to require the granting of the application.

We think that the controversy must end with the decision of the General Term. The granting or withholding of the order for discovery was a matter of practice, subject to the discretion of the Supreme Court, and this court has no power to review such an order. (Code, § 190; *Olyde v. Rogers*, 87 N. Y. 625; *Stilwell v. Priest*, 85 id. 649; *Jenkins v. Putnam*, 106 id. 272-276; *Glenney v. Stedwell*, 64 id. 120-128.)

The appeal should be dismissed, with costs.

All concur.

Appeal dismissed.

FRANK W. COLWELL, as Receiver, etc., Respondent, v. THE GARFIELD NATIONAL BANK, Appellant.

A court of original jurisdiction has not power, before judgment in an action in which a receiver *pendente lite* had been appointed on the application of the plaintiff, to make an order continuing the receivership, after judgment shall have been rendered, during the pendency of any appeal which may be taken therefrom.

In cases where the provisions of the Code of Civil Procedure, in reference to the appointment of receivers (§ 713) are applicable, and they furnish

Statement of case.

an adequate remedy, the power of the court is limited by that section, and it must proceed in the manner therein provided, otherwise its orders will be void.

It seems the court may appoint a receiver after judgment, and pending an appeal, although the judgment denies relief to the plaintiff; but the Code contemplates that such application will be made upon the whole case, including the adverse judgment, and does not permit the order to be made in anticipation of the judgment.

Accordingly *held*, where after trial and a decision adverse to plaintiff in an action in which a receiver *pendente lite* had been appointed, but before judgment, an order was granted continuing the receivership until after the decision of any appeal from the judgment, that the receiver had no authority after the entry of judgment to bring an action to recover a claim, a part of the assets in his hands as receiver; and where the facts appeared in the complaint in such an action, that it was a good ground for a demurrer.

(Argued January 27, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made January 7, 1889, which affirmed a judgment in favor of plaintiff entered upon an order overruling a demurrer to the complaint.

The nature of the action and the material facts are stated in the opinion.

Louis O. Van Doren for appellant. The power of the court to appoint a receiver has been defined by the legislature, and there remains no power in the Supreme Court by which an unlimited discretion can be exercised. (Code Civ. Pro. § 713; 13 Abb. Pr. 6; 66 N. Y. 127; *People ex rel. v. Bowe*, 81 id. 43; *Dusenbury v. Keiley*, 85 id. 388.) The court below erred in appointing plaintiff receiver. (*Ferguson v. Crawford*, 70 N. Y. 254.)

William B. Ellison for respondent. The moneys in defendant's hands to the credit of the estate of Joseph Colwell, deceased, or the executors or trustees of or under his last will and testament, were not applicable to the payment of the defendant's claim against Hepworth or Hepworth & Co.

Opinion of the Court, per ANDREWS, J.

(*Stewart v. Robinson*, 21 Abb. [N. C.] 63.) The entry of judgment in the suit of *Stewart v. Robinson*, even had no order been entered expressly continuing the receivership, would not, *ipso facto*, determine the plaintiff's powers as receiver. (Beach on Receivers, § 799; *Cook v. Findlay*, 60 How. Pr. 375; *Whiteside v. Prendergast*, 2 Barb. Ch. 472; *Ireland v. Nichols*, 9 Abb. Pr. [N. S.] 71; *K. N. L., etc., Co. v. Davidson*, 13 Mo. App. 561; *Beverly v. Brooke*, 4 Gratt. 220.) The court did not err in continuing the receivership after judgment. (Beach on Receivers, § 799; *Whiteside v. Prendergast*, 2 Barb. Ch. 472; *Ireland v. Nichols*, 9 Abb. Pr. [N. S.] 73.) The Code of Civil Procedure authorizes the appointment of a receiver pending appeal. (Code Civ. Pro. § 713, subd. 3.) The validity of the orders appointing or continuing the receivership cannot be attacked in this action. (*Atty.-Gen. v. G. M. L. Ins. Co.*, 77 N. Y. 275; *Smith v. Danzig*, 64 How. Pr. 329; Beach on Receivers, § 701; *Edrington v. Pridham*, 65 Tex. 612; *M. T. Co. v. P., etc., R. R. Co.*, 29 Fed. Rep. 732; *Rinn v. A. F. Ins. Co.*, 59 N. Y. 143.) The order continuing the receivership continued him in all the power and authority given the receiver by the order appointing him. (*Rockwell v. Farrell*, 45 N. Y. 166.) .

ANDREWS, J. The demurrer raises the question as to the power of the court of original jurisdiction, before judgment in an action in which a receiver *pendente lite* has been appointed on the application of the plaintiffs, to make an order continuing the receivership after judgment shall have been rendered, during the pendency of any appeal which may be taken therefrom to the Supreme Court or to this court.

The complaint shows that an action was commenced by James and George Stewart, claiming to be creditors of the firm of Hepworth & Co., of which one Colwell was a member, against Hepworth, the surviving partner, and the executors of Colwell, to sequester the estate of Colwell and charge it with a debt contracted after the death of Colwell by Hep-

Opinion of the Court, per ANDREWS, J.

worth in the name of Hepworth & Co., in favor of the Stewarts, on the ground that by the partnership agreement the partnership business was to be continued after the death of either partner, for the joint benefit of the surviving partner and the estate of the deceased partner, and that the estate of Colwell was liable for the debt of the Stewarts. The case was decided in this court adversely to the Stewarts in 115 N. Y. 328. The complaint in the present action further shows that after the trial of the action of the Stewarts, but before any decision was made or rendered, a receiver *pendente lite* was appointed therein by the judge before whom the trial was pending, on the application of the plaintiffs therein and with the assent of two of the then executors of Colwell, the third executor opposing the appointment. The order purported to vest in the receiver all the property and estate, real and personal, of Colwell in the possession of, or under the control of his executors and trustees under his will, with power to collect all debts and demands due or to become due to the estate of Colwell, to retain and pay counsel, and generally investing the receiver with full power to take possession of and manage the estate, subject to the order of the court. This original order, dated February 4, 1888, was followed by another order dated February 25, 1888, made by the same judge, but *ex parte*, so far as appears, continuing the receivership under the order of February 4, 1888, "with all the powers and duties" thereby imposed and conferred, for thirty days after the entry of judgment in the action, and if an appeal shall be taken, until thirty days after the decision of the appeal by the General Term, and in like manner until after the decision of any appeal which might be taken to this court, and thereafter "until an entry of an order of this (Supreme) court, discharging said receiver." The order of February 25, 1888, was also made before judgment. It recites the prior order, and also that "this action having been tried and decision rendered, but no judgment entered, and the parties proposing to appeal from the judgment when entered, etc." The decision, and the judgment subsequently entered

Opinion of the Court, per ANDREWS, J.

thereon, was adverse to the plaintiffs in the action, by whom the orders appointing and continuing the receiver were procured. This action was commenced by the receiver, after judgment against the Stewarts in the action in which he was appointed had been affirmed at the General Term, to recover a debt owing by the defendant to the estate of Colwell.

We are of opinion that the court had no power prior to judgment, to make the order of February 25, 1888, continuing the receivership pending appeals from a judgment which might thereafter be rendered in the action. The original action was at least very unusual. The plaintiff therein sought to take the settlement of the estate of Colwell out of the hands of his executors, and oust the surrogate of the jurisdiction confided to him in the settlement and distribution of the decedent's estate. No grounds are set forth in the complaint in the present action for the exercise in the particular case of this extraordinary jurisdiction. But assuming that a case could have been made, and that the original order of February 4, 1888, was not void for want of jurisdiction, we are nevertheless of the opinion that the court had no power by another order made before judgment, to continue the receivership after judgment and pending appeals therefrom. The power of the court to appoint receivers is prescribed by section 713 of the Code of Civil Procedure. The first subdivision of that section provides for the only case where a receiver can be appointed before judgment, and that is the usual receiver *pendente lite*, whose active functions terminate with a judgment adverse to the party who procures his appointment, although his character as receiver may continue for the purpose of rendering his account, until he is by order discharged from his trust. (*Whiteside v. Prendegast*, 2 Barb. Ch. 471.) But we find no authority to support the proposition that a receiver *pendente lite*, may, after judgment against the party at whose instance he was appointed, commence an action in behalf of the estate which he represents. The second subdivision of section 713, authorizes the appointment of a receiver by or after final judgment, to carry the

Opinion of the Court, per ANDREWS, J.

judgment into effect. This has no application to the present case. The third subdivision authorizes the appointment of a receiver "after judgment, to preserve the property during the pendency of an appeal." The order of February 25, 1888, continuing the receivership, was made before, and not after final judgment, and the order was not justified by this subdivision.

We need not determine in this case whether the jurisdiction of the Supreme Court to appoint receivers, can be exercised only in the cases and under the circumstances prescribed by section 713, or by other statutes. But in cases where the provisions of section 713, are applicable, and the statutory provisions furnish an adequate remedy, the power of the court is we think limited by that section, and it must proceed in the manner pointed out thereby, or else its orders will be void. It is within the power of the court, after judgment, to appoint a receiver pending an appeal therefrom, although the judgment denies relief to the plaintiff. But the Code evidently contemplates that this application is to be made upon the whole case, including the adverse judgment. It does not permit an order to be made in anticipation of the judgment, continuing the receivership after judgment shall have been rendered. The protection of the rights of parties does not require any departure from the practice prescribed by section 713. The power of the court to stay proceedings pending an application for the appointment of a receiver under the third subdivision, preserves any substantial rights of the defeated party. The order of February 25, has no added force because two of the executors of Colwell may have united in the application for it, or for the reason that the receiver is one of the executors. It was opposed by the third executor, and his opposition prevents the order being regarded as made by the consent of all the parties in interest, assuming that such consent would have conferred jurisdiction.

We think the order of February twenty-fifth was made without jurisdiction, and did not operate to vest in the plaintiff a right of action to recover the claim sued upon.

Statement of case.

The judgments of the Special and General Terms should, therefore, be reversed, and judgment directed for the defendants on the demurrer.

All concur.

Judgment accordingly.

CORN EXCHANGE BANK OF CHICAGO, Appellant, v. ALPHONSO
W. BLYE, as Receiver, etc., Respondent.

119 414
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When an error has been made in the form of a judgment, by which its scope has been enlarged or its amount increased beyond that plainly authorized by a verdict, referee's report or decision of the court, the judgment is not void or inoperative, and no question is presented for the consideration of the court on appeal; the error is an irregularity merely, which must be corrected, if at all, by motion in the court of original jurisdiction, to be made within one year after notice of the judgment or filing of the judgment-roll. (Code Civ. Pro. §§ 724, 1282.) In an action to recover possession of certain bonds, with damages for detention, the court ordered a verdict for plaintiff, and, with the consent of both parties, ordered an assessment for the value of the property, "including damages," at \$25,315.18, and a verdict was rendered accordingly. Judgment was entered directing a delivery of the bonds, with \$2,315.18 damages for their detention, and, in case delivery should not be had, that plaintiff recover \$25,315.18. A copy, with notice of entry, was served upon defendant, who appealed. After affirmance of judgment on appeal, and more than a year after such service, defendant moved to vacate so much of the judgment as provided for payment of damages in case of return of the bonds. *Held*, that the question was not presented on the appeal, and so the decision thereon did not deprive the court of jurisdiction to hear the motion; but, *held*, that the court had no authority so to do because it was made after the expiration of the time limited.

Corn Exchange Bank of Chicago v. Blye (54 Hun, 312) reversed.

(Argued January 27, 1890; decided February 23, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made November 7, 1889, which reversed an order of Special Term denying a motion to correct a judgment. The nature of the action and the material facts are stated in the opinion.

Opinion of the Court, per RUGER, Ch. J.

Robert L. Wensley for appellant. The order of the General Term reviews and in part reverses the judgment of the Court of Appeals upon the record, which was presented to this court upon defendant's appeal from the judgment. This oversteps the jurisdiction of the General Term, and is in excess of its lawful authority. (*Hone v. DePeyster*, 106 N. Y. 648; *Brigg v. Hilton*, 99 id. 531; *Williams v. Thorn*, 81 id. 382; *De Labalette v. Wendt*, 75 id. 579; *Sheridan v. Andrews*, 80 id. 648, 650; *Marshall v. Boyer*, 5 N. Y. Supp. 150; Code Civ. Pro. § 1317; *Gelston v. Codewise*, 1 Johns. Ch. 189; 4 Wait's Pr. 243.) There was no error in the judgment nor in the verdict directed. (*N. Y. G. & I. Co. v. Flynn*, 55 N. Y. 653.) The theory of defendant's counsel, adopted by the court below, that in an action to recover the possession of coupon bonds bearing interest, plaintiff is entitled to no damages for detention of such chattels, is unsound in law and leads to absurdity. (*Bailey v. County of Buchanan*, 115 N. Y. 297.)

Elihu Root and *Samuel B. Clarke* for respondent. For a clerical or ministerial error the proper remedy in the first instance is a motion in the court that tried the case. (*Leonard v. N. Co.*, 84 N. Y. 48, 55, 56; *People v. Goff*, 52 id. 484; *Cole v. Tyler*, 65 id. 77; *Cagger v. Lansing*, 64 id. 417, 432; *Ingersoll v. Bostwick*, 22 id. 425; *Young v. Atwood*, 5 Hun, 234.) The error being not merely an irregularity, but affecting a substantial right, the court has an inherent power to correct it at any time, and its power is not restricted by the Code provisions limiting the time within which motions, that affect irregular procedure only, can be made. (*Hatch v. C. N. Bank*, 78 N. Y. 487; *Dinsmore v. Adams*, 48 How. Pr. 274; 5 Hun, 149; Code Civ. Pro. § 723; *Griswold v. Haren*, 26 How. Pr. 170.)

RUGER, Ch. J. This appeal presents the question whether the court have authority to vacate and annul so much of a judgment in replevin, as provided for the payment of dam-

Opinion of the Court, per RUGER, Ch. J.

ages for the detention of the property, in addition to its return, after four years from the entry of the judgment, and the same had been affirmed in the court of last resort. The ground upon which the application was made, was that the verdict of the jury did not state the specific sum awarded for damages from detention, and that such damages were, therefore, incorporated in the judgment without authority. Upon the hearing at Special Term before the judge who tried the cause, the motion was denied, but upon appeal this order was reversed by the General Term and the motion was granted.

The action was for the recovery of forty-six bonds of \$500 each, with coupons attached, alleged to be of the value of \$35,000, and damages for detention in the sum of \$5,000. The court decided, at the close of the evidence, that the plaintiff was entitled to a verdict for the return of the bonds. Some conversation thereupon ensued between the respective counsel in regard to the value of the property and the amount of damages for its detention, and the court ordered a verdict for the plaintiff, and, with the consent of both parties, directed an assessment for the value of the property, *including damages*, at \$25,315.18. The judgment entered on the verdict provided that the plaintiff should have delivery of the bonds and \$2,315.18 damages for their detention, and, in case delivery should not be had, that plaintiff have and recover \$25,315.18 damages for the detention of said chattels. The judgment was entered in November, 1885, and a copy thereof, with notice of entry, was immediately served upon the defendant, and he soon thereafter appealed from the judgment.

It is claimed that the verdict did not authorize the judgment, so far as it provided for the sum of \$2,315.18 as damages for detention, in case the property was delivered, and this motion was made to vacate that portion in June, 1889.

It is urged, on this appeal by the plaintiff, that the court below had no power to vacate or modify the judgment actually entered, after it had been affirmed by the appellate courts. This contention rests upon the question whether the error in entering the judgment raised a question which could be availed

Opinion of the Court, per RUGER, Ch. J.

of by the defendant on appeal; if it could, then, obviously, the court below could not afterwards change the substantial character of the judgment affirmed. We think the decisions are uniformly to the effect, that when an error has been made in respect to the form of the judgment, by which its scope or amount has been enlarged or increased beyond that plainly authorized by a verdict, referee's report or decision of a court, a question is not presented for the consideration of the court on appeal; but the error must be corrected, if at all, by motion in the court of original jurisdiction. (*Leonard v. Col. St. Nav. Co.*, 84 N. Y. 48; *People ex rel. v. Goff*, 52 id. 434; *Campbell v. Seaman*, 63 id. 568; *Cagger v. Lansing*, 64 id. 417; *Johnson v. Carnley*, 10 id. 570; *Moran v. Chase*, 52 id. 346; *Patten v. Stitt*, 50 id. 591; *Ingersoll v. Bostwick*, 22 id. 425.)

The case of *Sheridan v. Andrews* (80 N. Y. 648) is not an authority to the contrary. There a judgment in favor of several defendants, awarding costs respectively to such defendants, was affirmed in this court. It was held that the Supreme Court could not, after such affirmance, vacate the judgment as to costs, inasmuch as the right thereto depended upon the case made and was one of the questions presented to this court for consideration upon appeal, and, having been specially adjudicated, could not be reviewed again in the court below.

But the appellant also urges that the order made by the General Term violates the provisions of section 1282 of the Code of Civil Procedure, which provides that a motion to set aside a final judgment for irregularity, shall not be heard after the expiration of one year from the filing of the judgment-roll. It was held in the court below, that this section did not apply, for the reason that the addition to this judgment was not an irregularity, but was entirely and wholly unauthorized. It was further said that it was illegal and without any foundation for it to rest upon. We do not think the reasons alleged are sufficient to show that the act complained of was not an irregularity within the meaning of the statute; for, whatever may be the character of an irregularity,

Opinion of the Court, per RUGER, Ch. J.

we suppose it must always consist of some act done without legal authority. The irregularities referred to are necessarily those arising in practice and consist of some step or proceeding taken in the prosecution or defense of an action, which is without authority of law, or contrary to some rule of practice.

It is said in Graham's Practice (p. 702): "An irregularity may be defined to be the want of adherence to some prescribed rule or mode of proceeding, and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time, or improper manner." The term is apparently used in contradistinction to jurisdictional defects, which courts have no power to authorize or approve.

We are of the opinion that the claim introduced into the judgment, which was not specifically described in the verdict, was an irregularity merely, which was not void, but was subject to be corrected by motion alone. (See § 724, Code of Civil Procedure.)

The Code required the jury to find the damages occasioned by detention, and they did so, but erroneously added the sum found to the amount assessed as the value of the property. The defendant does not object to the total valuation; but only to distribution of the gross sum found to its respective elements of damage. To give effect to this objection would occasion a loss of all damages for detention to the plaintiff in case the property is returned. It was undoubtedly irregular for the clerk to make this distribution without an order of the court; but his doing so was not wholly unwarranted, as the verdict rendered furnished some grounds for awarding damages for detention. The verdict having been rendered by direction of the court, it could, on motion, amend the verdict to make it conform to its intention. (*Hodgkins v. Mead.**)

The Code requires the clerk to make up the judgment-roll, and the judgment is required to conform to the terms of the verdict or decision (§ 1189); but in case it exceeds the relief, or sum, awarded thereby, it is an irregularity for which the

*Ante, page 166.

Opinion of the Court, per RUGER, Ch. J.

remedy is by motion alone, to be made within one year after notice of the proceeding (§ 724, Code).

The defendant, in his moving papers, terms this an irregularity, and so it has been described to be in numerous cases. In *Johnson v. Camley* (*supra*), where, upon a verdict for the plaintiff in replevin, he entered a judgment for the absolute recovery of damages, instead of one in the alternative for damages or a return of the property as required by statute, it was held that the only remedy was a motion to set it aside for irregularity. The same question, for a similar error, was raised in *Ingersoll v. Bostwick* (*supra*), and was decided in the same way, the court saying: "This was the entry of a judgment different from that directed by the referee, and was, unless done by consent of the parties, an irregularity, to be corrected by the court below."

Cagger v. Lansing (*supra*) was an action in ejectment in which a verdict was directed for the plaintiff for damages for withholding possession of the premises when no foundation was laid in the case for such damages. Judge FOLGER says: "It is true that the judgment entered herein does speak of the sum recovered as damages for the withholding of the possession, but that is not an error brought up by the exception. It is indeed an irregularity in the entry of judgment which would have been corrected on motion."

In *People ex rel. Oswald v. Goff* (*supra*) the late Chief Judge CHURCH says: "The provision in the judgment for a restoration of the money collected on the tax is improperly there. The order of the Special Term allowing it having been reversed by the General Term, it is the same as though no authority ever existed, but it is not properly before us on this appeal. Having been inserted without authority, the proper remedy is by motion to correct the judgment." In *Leonard v. Columbia Steam Navigation Co.* (*supra*) the plaintiff had inserted in the judgment-roll, in an action of tort, a sum for interest without authority from the verdict or otherwise. The court say: "Where a clause is inserted in the judgment without authority the proper remedy is by

Statement of case.

motion to correct the judgment, and not by appeal." Judge RAPALLO says, in *Moran v. Chase (supra)*, a mechanic's lien case, that "the personal judgment entered against the owner is not warranted by the report of the referee, and does not seem to be warranted by the statute. The proper remedy for this irregularity was, by motion to the Supreme Court, to correct the judgment so as to make it conform to the report." (See, also, *Campbell v. Seaman, supra*.)

Such judgments are not void or inoperative, but are simply irregular, and may be waived or acquiesced in by delay in moving to vacate, or by taking an appeal therefrom. (*Judd Linseed and Sperm Oil Co. v. Hubbell*, 76 N. Y. 543; *Nat. Bk. v. Spencer*, 19 Hun, 569; *Mayor, etc., v. Lyons*, 1 Daly, 296; *Brigg v. Hilton*, 99 N. Y. 517; *Graham's Pr.* 702 *et seq.*)

We think the statute referred to presents an insuperable bar to the motion to vacate, and that the order of the General Term should be reversed and that of the Special Term affirmed, with costs in this court and the Supreme Court.

All concur.

Judgment reversed.

ARTHUR G. YATES, Respondent, v. JAMES G. GUTHRIE,
Appellant.

Upon a motion to vacate a judgment entered as by default, in an action commenced by the service of summons and complaint on March sixth, it appeared that an answer setting up a defense, was mailed at C., where defendant's attorney resided, to plaintiff's attorney at R., where he resided, on the evening of March twenty-sixth. Judgment was entered by default March twenty-seventh. Defendant showed merits. The court denied the motion, but allowed the defendant to come in and defend, the judgment to stand as security. *Held*, error, that the entry of judgment was premature, and defendant's right to have it set aside could not be clogged with the condition that it should stand as security.

(Submitted January 27, 1890 ; decided February 25, 1890.)

Statement of case.

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 1, 1889, which affirmed an order of Special Term denying a motion to vacate the judgment.

This was a motion to vacate a judgment taken against defendant by default for want of appearance or answer.

The material facts are stated in the opinion.

William J. Byam for appellant. There is, legally, no issue, or doubt as to the time when defendant's answer was served; and under all the circumstances of this case, the Court at General Term erred in holding that "the affidavits of the defendant and his attorney cannot be deemed to be conclusive upon this matter." (*Annis v. Upton*, 66 Barb. 370.) "The rule is unquestioned that the party addressed takes the hazards of the mail, and that if an answer is actually deposited in the post-office within the time limited by the statute, the service is sufficient." Plaintiff cannot, without leave of court, disregard an answer duly served in time; nor can he be allowed to secure a preference over other creditors by refusing to set aside a judgment entered in disregard of an answer duly and seasonably served. A regular pleading, duly and seasonably served, cannot be treated as a nullity, because frivolous or insufficient. (*Bergman v. Howell*, 3 Abb. Pr. 329; *Hartness v. Bennett*, 3 How. Pr. 289; *Strout v. Curran*, 7 id. 36; *Levi v. Jakeways*, 4 id. 126; *Wilkes v. Ferris*, 5 Johns. 335; *Jacobs v. Remsen*, 36 N. Y. 668.) The order is appealable. (*White v. Coulter*, 59 N. Y. 629; *Fredricks v. Taylor*, 52 id. 596; *Foote v. Lathrop*, 41 id. 358.) The court erred in ordering the action referred to a referee to hear and determine the same. (*Swift v. Wells*, 2 How. Pr. 79.)

Putnam & Slocum for respondent. The only question in the case was the simple one of fact, as to whether the answer was served on the 26th day of March, 1889, or upon some later day. (Code Civ. Pro. § 1337.) The court at Special Term made a proper disposition of the motion. (*Elwood*

Opinion of the Court, per ANDREWS, J.

v. *W. U. T. Co.*, 45 N. Y. 549, 553; *Kavanagh v. Wilson*, 70 id. 177, 179; *Koehler v. Adler*, 78 id. 287, 292; *Wohlfahrt v. Beckert*, 92 id. 490; *Lesser v. Wunder*, 9 Daly, 70, 73; *Pease v. Barnett*, 27 Hun, 378; *Van Buren v. Cockburn*, 14 Barb. 118; *Newton v. Pope*, 1 Cow. 110; *Lomer v. Meeker*, 25 N. Y. 361.)

ANDREWS, J. This action was commenced by the service of summons and complaint March 6, 1889. The fact that the answer was mailed at Caledonia, where defendant's attorney resided, on the evening of March 26, 1889, to plaintiff's attorney at Rochester, where he resided, is established by the positive affidavits of the defendant and his attorney, and is corroborated by the postmark on the envelope which enclosed it. The letter was received at the Rochester post-office on the twenty-seventh, but after eleven o'clock on the morning of that day. The affidavit of the assistant postmaster at Rochester states that a letter mailed at Caledonia on the twenty-sixth in ordinary course should have reached Rochester at the latest by the morning mail. But this does not contradict the positive testimony that the letter was put in the mail on the twenty-sixth. At most, it affords ground for a conjecture that it may have been mailed after the twenty-sixth. But it is more consistent with probabilities that some delay occurred in forwarding the letter from Caledonia after its deposit, especially as the letter is stamped as received there on the twenty-sixth.

The entry of judgment on the twenty-seventh was, therefore, premature, and the right of the defendant to have the judgment set aside could not be clogged with the condition that it should stand as security, the answer setting up a defense and merits being shown.

The orders of the Special and General Terms should be reversed and the motion to set aside judgment granted.

All concur.

Orders reversed and motion granted.

Statement of case.

JAMES H. HUGHES, Respondent, v. THE UNITED PIPE LINES,
Appellant.

Upon trial of an action to recover for the alleged unlawful conversion of a quantity of oil placed in defendant's possession for storage by W. and M. and which defendant, upon demand and after notice of plaintiff's claim, refused to deliver, plaintiff, to establish his title, introduced in evidence a judgment-roll in an action brought by W. and M. against him, in which the title to the oil was in issue, and it was decided that plaintiff here was owner. The referee held that said judgment conclusively established plaintiff's right to the oil, and excluded evidence offered by the defendant to dispute said right. *Held*, no error.

Oil in the earth belongs to the owner of the land, and when unlawfully taken therefrom by a wrong doer the title of such owner remains perfect, and he may pursue and reclaim the property wherever he may find it.

(Submitted January 28, 1890 ; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made February 20, 1888, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover of the defendant for the wrongful and unlawful conversion of about 5,000 barrels of oil, which the plaintiff claims was produced from an oil well belonging to him, and was placed in the possession of the defendant for storage by William and Maria Stephan.

The right of the plaintiff to the oil was put in issue by the answer of the defendant, and upon the trial of the action before a referee the plaintiff, to establish his title to the oil, produced in evidence the judgment-roll in an action wherein William and Maria Stephan were plaintiffs and he was defendant. The referee held that the judgment in that action conclusively established plaintiff's right to the oil, and excluded the evidence offered on the part of the defendant to dispute that right; and upon proof of the quantity of oil and its value, he gave judgment in favor of the plaintiff.

Further facts appear in the opinion.

Statement of case.

J. R. Jewell for appellant. The judgment in the former action of *Stephan v. Hughes* is no estoppel upon the defendant in this action, and is not *res adjudicata* or conclusive. (*Smith v. Smith*, 79 N. Y. 634; *Stowell v. Chamberlain*, 60 id. 272; *Pray v. Hegeman*, 98 id. 351; *Jordan v. Van Epps*, 85 id. 427.) The defendant not being a party to the former action, is not concluded by the judgment therein. (*Shattock v. Bascom*, 105 N. Y. 339.)

Loveridge & Leggett for respondent. A subsequent executory contract, in order to operate as a defeasance or modification of a previous contract by specialty, though that be executory, must itself be under seal, whether it have a consideration or not, and whether it be made before or after a breach of the previous contract or not. (*Eddy v. Graves*, 23 Wend. 82; *Allen v. Jaquish*, 21 id. 628; *Lynch v. McBeth*, 7 How. Pr. 113; *Clough v. Murray*, 3 Robt. 7.) The judgment of this court in the action of *Stephan v. Hughes*, adjudging the ownership and possession of the oil well in controversy to Hughes, is conclusive upon both parties and cannot again be litigated. (1 Greenl. on Ev. § 528; *Parkhurst v. Berdell*, 110 N. Y. 386; Abb. Trial Ev. 826; 2 Smith's L. C. 662; *Doty v. Brown*, 4 N. Y. 71; *White v. Coatsworth*, 6 id. 137; *Castle v. Noyes*, 14 id. 329; *Demarest v. Darg*, 32 id. 281; *Clemens v. Clemens*, 37 id. 59; *Leavitt v. Wolcott*, 95 id. 212; *Moore v. City of Albany*, 98 id. 396, 410; *Bouchard v. Diaz*, 3 Den. 238; *Birckhead v. Brown*, 5 Sandf. 135.) When there has been no opportunity to plead a matter of estoppel in bar and it is offered in evidence it is equally conclusive as if it had been pleaded. (1 Greenl. § 531; Abb. Trial Ev. 828, 829; *Calkins v. Allerton*, 3 Barb. 171; *Doty v. Brown*, 4 N. Y. 71; *Castle v. Noyes*, 14 id. 329; 1 Greenl. on Ev. §§ 523, 535, 536; *Case v. Reeve*, 14 Johns. 81; *Voorhees v. Seymour*, 26 Barb. 569, 583; *Candee v. Lord*, 2 N. Y. 369; *Raymond v. Richmond*, 78 id. 351; *White v. Coatsworth* 6 id. 137, 143; *Cromwell v. County of Sac*, 94 U. S. 526, 531; *Tuska v. O'Brien*, 68 N. Y. 446; *Blair v. Bartlett*, 75 id. 150;

Opinion of the Court, per EARL, J.

Dunham v. Bower, 77 id. 77; *Perry v. Dickerson*, 85 id. 345; *Jordan v. Van Epps*, Id. 436; *Church v. Kidd*, 88 id. 652; *Crabb v. Young*, 92 id. 57; *Patrick v. Shafer*, 94 id. 425; *Leavitt v. Walcott*, 95 id. 212.) The offer of the appellant to show the expense of sinking the well, etc., whether in mitigation of damages or otherwise, was certainly an offer to prove matters neither material nor competent. (*Suydam v. Jenkins*, 3 Sandf. 614; *Develin v. Pike*, 5 Daly, 85; *Baker v. Wheeler*, 8 Wend. 505; *Silsbury v. McCoon*, 3 N. Y. 379; *Joslin v. Cowee*, 21 Barb. 48; 52 N. Y. 90; *Guckenheimer v. Angervine*, 81 id. 394, 397; *Walther v. Wetmore*, 1 E. D. Smith, 7; 2 Schuler on Per. Prop. 48; *Stall v. Wilber*, 77 N. Y. 158; *Rider v. Hathaway*, 21 Pick. 298; *Lobdell v. Stowell*, 51 N. Y. 70; *Burns v. Winchell*, 44 Hun, 261.)

EARL, J. It appeared upon the trial that the Stephans put down the oil well from which the oil in question was obtained. Hughes claimed that the well was upon his land, and notified the Stephans of his claim, and also gave notice to the United Pipe Lines, with which the Stephans had stored the oil, of his claim, and that it should not deliver the oil to them. This claim of Hughes and notice to the pipe lines embarrassed the Stephans, and, as they claimed, did them great damage; and they, therefore, brought an action against him, alleging that the well and the oil therefrom belonged to them, and they prayed for relief that it be adjudged that the oil did belong absolutely to them, and that Hughes be required to pay to them such damages as they might sustain by reason of his unlawful assertion and acts of ownership of and to the well and oil produced therefrom; and that they have such other and further relief as to the court should seem just and equitable. In that action Hughes put in issue the ownership of the well and oil produced therefrom, and prayed, among other things, for judgment that the oil well and the oil produced therefrom were his property. The action was referred, and the referee gave judgment dismissing the complaint, on the ground that the well and the oil produced therefrom belonged to

Opinion of the Court, per EARL, J.

Hughes, and judgment was entered in accordance with his report.

The very matter in issue in that action was the title to the well and the oil produced therefrom. To maintain their action the plaintiffs were bound to establish that the well and oil belonged to them; and the defendant in that action could defeat the same by showing that the well and oil belonged to him, and he prevailed upon that issue; and thus there was an adjudication binding upon the plaintiffs therein, that they had no title to the well or the oil produced therefrom, and that the same belonged to Hughes. The fact thus established could not again be brought in dispute between the same parties or their privies, and the judgment in that action conclusively established against the plaintiffs therein the right and title of Hughes to the well and the oil produced therefrom. This defendant stands in the place of Stephan and wife. It does not hold or claim the oil in its own right, but claims solely to hold it for Stephan and wife by whom it has been indemnified against the claim of this plaintiff. The adjudication, therefore, which binds them binds it, and this conclusion rests upon law so elementary that no citation of authorities to sustain it is needed.

It is clear, therefore, that the plaintiff is entitled to recover the value of this oil from the defendant. He early gave it notice of his claim; he demanded the oil of it and it refused to recognize his right. The oil in the earth belonged to him, and when taken therefrom by a wrong doer his title to the same still remained perfect, and he could pursue and reclaim it wherever he could find it. (*Silsbury v. McCoon*, 3 N. Y. 379.)

We are, therefore, of opinion that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

In the Matter of the Judicial Settlement by MARY J. CLARK,
as Executrix, etc., of the Account of LEMUEL B. CLARK,
as Executor, etc.

119	427
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Although a referee, in his report, places a finding of fact among his conclusions of law, this does not deprive it of its force.

In proceedings under the provisions of the Code of Civil Procedure (§ 2606), giving the surrogate jurisdiction upon the death of an executor to require his executor or administrator to account for and deliver over the trust estate, such representative stands in place of the decedent for the purpose of the accounting, and the surrogate's power is precisely the same as if the letters of the deceased executor had been revoked in his lifetime and he had been called upon to deliver up the assets.

In such a proceeding, the referee to whom the matter was referred by the surrogate found as facts that a large amount of money belonging to the estate was received by C., the deceased executor, beyond the sums acknowledged in the account presented by his executrix, specifying various items, including one of \$15,000 received by C. within three months of his death, and "deposited by him in his own private bank account," and that "there was no evidence of the disposition of said funds" by him, with certain specified exceptions; also, that the accounting executrix, although in possession of C.'s bank and check-books, refused to produce them. As conclusions of law, the referee found that there being no evidence of the disposition of said funds by C., they are presumed to have come into the possession of his executrix; and that said presumption was strengthened by the deposit by C. to his private account, and the refusal of his executrix to produce such book, and that a decree should be entered against her individually and as executrix for the sums due. Upon the hearing before the surrogate he modified the finding that the moneys received by C. were deposited by him in his own private account, by substituting a finding that the moneys were deposited to his own individual credit, and he sustained exceptions to the conclusions of law, so found, as to the presumption that the fund came into the possession of the executrix, and to the direction of judgment against her individually, and he awarded judgment against her as executrix simply; the report in all other respects was confirmed. The General Term affirmed the decree on the ground mainly that there was no finding by the referee that the fund belonging to the estate received by C. passed into the hands of his executrix. *Held*, error; that the finding as to the presumptions were of fact, not of law, and amounted to a finding that the fund which C. received passed on his death into the actual possession of the executrix; and that the conclusion as to her individual liability followed as a conclusion of law.

(Argued January 28, 1890; decided February 25, 1890.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made July 9, 1889, which affirmed a decree of the surrogate of the county of New York.

The nature of the proceeding and the facts are sufficiently stated in the opinion.

Horace Secor, Jr., for appellant. Upon the trial of an issue of fact before the surrogate, section 2545 of the Code makes sections 992-998 applicable to surrogates courts "so as to enable the surrogate's rulings upon the law to be reviewed, where there is no question of fact involved, without the expense and trouble of making up a case containing all the testimony." (Throop's Anno. Code, § 2545; *Angevine v. Jackson*, 103 N. Y. 470; *In re Hood*, 104 id. 106; *Schwarz v. Weber*, 103 id. 658; *Berger v. Berger*, 111 id. 527, 530; *Billings v. Russell*, 101 id. 228; Code, § 2546; *In re Niles*, 47 Hun, 348; *Wheelwright v. Rhoades*, 11 Abb. [N. C.] 382; 28 Hun, 57.) The main question involved on this appeal is as to the surrogate's disallowance of so much of the referee's conclusions of law as finds in substance that the moneys in question came into the hands of the accounting executrix, and directs a decree against her, personally, therefor. If these moneys came into her hands, there can be no question as to our right to a decree against her, personally. (Code Civ. Pro. § 2606; *In re Fithian*, 44 Hun, 457; *In re Adams*, 2 Redf. 66; *In re Fithian*, 14 Civ. Pro. Rep. 52; *Bleecker v. Johnston*, 69 N. Y. 311; *L., etc., Co. v. M., etc., Co.*, 7 Wend. 31; *Livingston v. Newkirk*, 3 Johns. Ch. 312; *Clifton v. U. S.*, 4 How. [U. S.] 242; *Bruce v. Kelly*, 7 J. & S. 27, 36, 38; *Wylde v. N. R. R. Co.*, 53 N. Y. 156, 163; *Armory v. Delamare*, 1 Smith's L. C. 679; *People v. McWhorter*, 4 Barb. 438; 1 Greenl. on Ev. §§ 33, 37; *Howard v. Daly*, 61 N. Y. 366; *Lowery v. Erksine*, 113 id. 58; 2 Perry on Trusts, § 821; *Sherman v. H. R. R. Co.*, 64 N. Y. 254, 259.)

G. W. Cotterill for respondent. The court has no jurisdiction of this appeal, for the want of a case. (Code Civ.

Opinion of the Court, per FINCH, J.

Pro. § 2576.) The appellant not having made a case containing the evidence, the law presumes that the evidence was conclusive and fully justified the surrogate in his refusal to confirm the report. (*Porter v. Smith*, 107 N. Y. 531; *Eurger v. Burger*, 111 id. 530.) The referee plainly exceeded his powers under the order of reference, and had no right to make any findings whatever charging Mrs. Clark personally. (*Boughton v. Flint*, 74 N. Y. 477.) The finding of the referee, that, Clark having deposited the money "in his own private bank account," the presumption is that the same came into Mrs. Clark's possession as the executrix of her husband, there being no evidence of the disposition of said funds, is wholly unwarranted as a matter of law on its face, and becomes untenable in the light of the evidence. (2 R. S. 71, § 11; *Shook v. Shook*, 19 Barb. 656; *L. & F. Ins. Co. v. M. F. Ins. Co.*, 7 Wend. 33.)

FINCH, J. On the 8th day of July, 1886, the petitioner, describing herself as the widow and executrix of Freeman J. Fithian, deceased, presented her petition to the surrogate, reciting that letters testamentary on the estate of Fithian, had been issued on the 15th day of October, 1884, to Lemuel B. Clark; that he died June 9, 1886, having served as executor of Fithian for about one year and three-quarters; that his widow, Mary J. Clark, had on the day preceding the filing of the petition been duly appointed executrix of the will of said Clark by letters testamentary regularly issued; that Clark had never in his life-time filed an inventory or rendered an account as executor of Fithian; and asking that Mrs. Clark be cited to show cause why the account of Clark should not be rendered and settled. A citation was issued accordingly, and on its return Mrs. Clark rendered an account to which many and serious objections were taken, and the surrogate thereupon made an order referring it to a referee. This was done under the provisions of section 2606 of the Code, which gives the surrogate jurisdiction upon the death of an executor to require his executor or administrator to account

Opinion of the Court, per FINCH, J.

for and deliver over the trust estate, precisely as if the letters of the deceased executor had been revoked in his life-time and he had been called upon to deliver up the assets. His representative stands in his place for the purpose of such accounting and delivery. The reference was ordered under the authority of section 2546, which permits, among other things, a reference "to examine an account rendered, to hear and determine all questions arising upon the settlement of such an account which the surrogate has power to determine, and to make a report thereon, subject, however, to confirmation by the surrogate." The section then gives to the referee "the same power" and entitles him to the same compensation "as a referee appointed by the Supreme Court for the trial of an issue of fact in an action." So far the section followed section 6 of chapter 359 of the Laws of 1870, which related to Surrogate's Courts in the city of New York. Its next step, however, is much broader in its terms. It reads: "The provisions of this act applicable to a reference by the Supreme Court apply to a reference made as prescribed in this section so far as they can be applied in substance, without regard to the form of proceeding." How much or how little is accomplished by this very general language it may trouble us some day to determine. It seems to open everything and settle nothing. For present purposes we may possibly, to some extent, avoid its interpretation, since the appeal here pending is taken solely from so much of the decree of the surrogate as modified the determination of the referee. The latter, after hearing the evidence, made formal findings of fact and conclusions of law. He found, as facts, that a large amount of money was received by Clark which belonged to the Fithian estate, beyond the sums acknowledged in Mrs. Clark's account; that \$3,000 thereof was so received by Clark on the 3d of November, 1884, and \$15,000 on the 23d of February, 1886, which was less than four months before Clark's death; that the moneys so received by Clark "were deposited by him in his own private bank account;" that there was "no evidence as to the disposition of said funds so received by said Clark as

Opinion of the Court, per FINCH, J.

such executor, except the payments for which credit is allowed and also the investment of \$5,000 thereof in the note of Horace F. Clark;" and that the accounting executrix, although in possession of Clark's bank and check-books, refused to produce the same. The referee then found four conclusions of law, as he denominates them: First, that there is due the estate of Fithian \$24,864.75; second, that there being no evidence of the disposition of the funds by Clark, they are presumed to have come into the possession of his executrix; third, that such presumption is strengthened by the deposit of Clark to his private account and the refusal of his executrix to produce his bank and check-books; and, fourth, that a decree should be entered against Mrs. Clark, individually and as executrix, for the sum found due.

When the report was filed with the surrogate, Mrs. Clark filed exceptions thereto. We do not know what they were, except as they are recited in the surrogate's decree. On the hearing before him, he allowed five of the exceptions taken by Mrs. Clark, viz.: Her second exception, which related to a credit claimed, and which is immaterial here; her fourth exception to the finding that the moneys received by Clark were deposited in his own private account, which the surrogate modified by a finding of his own, that "said moneys so received were deposited by him to his individual credit in the Hanover National Bank;" her eighth exception "to each and every part of the second conclusion of law, which finds or decides that the funds are presumed to have come into the possession" of the executrix; her ninth exception to the third conclusion as to the strengthening of that presumption; and her tenth exception to the award of an individual judgment. The surrogate then made a decree settling the account and awarding judgment against Mrs. Clark as executrix. From so much of this judgment as denied the individual liability of Mrs. Clark the petitioner appealed to the General Term.

Upon that appeal no case was made, and hence there could be no review of the facts. (Code, § 2576.) The evidence was not returned, and merely what is denominated a judg-

Opinion of the Court, per FINCH, J.

ment-roll. Of course, questions of law only could be presented. Whether they could be raised without the trace of an exception to the decision of the surrogate, and by treating his modification of the referee's report as appellate action rather than a primary and original decision, is an inquiry upon which we do not enter, because no such objection is taken. Those presented and argued stand upon other grounds. They were, as repeated here, first, that the whole case and all the evidence was before the surrogate, and it must be assumed that it warranted his decision; and, second, that there was no finding by the referee that the fund belonging to the Fithian estate and received by Clark had passed into the hands of Mrs. Clark. Upon this last ground, chiefly, the General Term affirmed the decision of the surrogate, but on this appeal both grounds are relied upon by the respondent.

The first might prove fatal to the appeal but for one consideration. Clark might have disposed of the Fithian fund during the last four months of his life so that no part of it was left when he died, and none of it passed to his executors, and it is said that fact may have been disclosed by the evidence upon which the surrogate acted, and we cannot assume the contrary. The answer is that the referee found the contrary, and the surrogate assented to that finding. It is the fifth finding of fact, and asserts that there is no evidence as to the disposition of the fund by Clark after he received it, except in the two respects stated, and involving only a small part of it. To that finding of the referee it does not appear that Mrs. Clark objected. If she did the surrogate refused to sustain her objection, for it is not among those which he did sustain. He confirmed the report in all respects except as he modified it, and so his decision must be tested upon the theory on which it stood, that the fund went into Clark's hands, and there was no proof that any of it went out except the two items specified.

We are thus brought to consider the view of the General Term upon which it rested its affirmance. It may be conceded that the findings of the referee, as it respects their form, are

Opinion of the Court, per FINCH, J.

open to criticism, and that some of them are rather statements of evidence than of facts, and are wrongly denominated conclusions of law. And yet I think that, in substance and under a fair and reasonable interpretation, they amount to a finding of fact that the Fithian fund which Clark received passed, on his death, into the actual possession of Mrs. Clark, the reasons for and grounds of that finding being stated, so that the conclusion of her liability followed as a conclusion of law. Substantially the report declares that from the facts that Clark received the fund in part within four months before his death; that he deposited it to his own credit in the bank; that no proof was given of payments by him, or any new or different disposition of the money; that his executrix, when called on to produce his bank-book and check-book which would have shown the facts, refused to do so; the referee inferred and found that the fund, at Clark's death, passed into the hands of the executrix, and so, as a conclusion of law, that she was personally liable for its delivery to the petitioner. When the referee says, in his second conclusion of law, that the funds "are presumed" to have come into the possession of Mrs. Clark, he evidently means that he draws that inference, and that such possession by her is a fact which flows from the proof, and, while he might have stated it more precisely and accurately, I think it fairly states the fact. That he placed it among his conclusions of law does not deprive it of its force. (*Sherman v. H. R. R. Co.*, 64 N. Y. 254.)

And so I think the General Term were wrong in saying there was no such finding. In substance and effect there was. Nor was it without some evidence to support it. The inference was a possible one upon the conceded facts, and there was no legal error in the finding.

It follows that the judgment of the General Term and the decree of the surrogate, so far as appealed from, should be reversed. We do not think that we are bound to affirm the conclusions of the referee. They were reported to the surrogate in aid of his decision and decree, and when we reverse that, a new hearing should be had as to Mrs. Clark's individual

Statement of case.

liability, and to leave that officer and the parties in proper freedom, we should vacate the order of reference. It is to be hoped as a result that the facts may fully appear, and danger of injustice to either party may be averted.

The judgment of the General Term and the decree of the surrogate, so far as appealed from, should be reversed, the order of reference vacated, and a new hearing granted, with costs to abide the event.

All concur.

Judgment reversed.

MAX MAYER, Appellant, v. JAMES McCREERY, Respondent.

In an action for the specific performance of an alleged agreement for the leasing of certain premises by defendant to plaintiff, the making of which plaintiff denied, the only evidence to establish the agreement was certain letters, one from plaintiff offering to lease the premises for a term of years at a rent specified, the buildings thereon to be altered similar to those a certain firm named "is now altering, * * * plans, etc., to be mutually agreed upon;" a reply from defendant acknowledging receipt of plaintiff's letter, and saying "I hereby accept your offer," and a letter from him four days later in which he states his counsel advises him "that there are difficulties which will prevent the making of a lease as proposed," adding, "you will, therefore, understand that the proposed lease cannot and will not be made." *Held*, that said letters did not constitute a completed agreement to lease; but an agreement in substance that, if the parties should thereafter agree upon plans for the alteration of the building, a lease would be given upon the terms specified; that it was immaterial what reason defendant gave, or what motive actuated him in his refusal to agree upon plans; that he had a right to insist upon such an agreement before plaintiff's right to demand a lease should arise; also, that plaintiff was not entitled to waive the condition as to alterations, and to demand a lease without an agreement as to plans.

(Argued January 28, 1890; decided February 25, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 18, 1887, which reversed an interlocutory judgment rendered at Special Term in favor of plaintiff and granted a new trial.

Statement of case.

The nature of the action and the material facts are stated in the opinion.

Frederic R. Coudert for appellant. In estimating the language that constitutes a lease, the form of words is of no consequence; it is not even necessary that the term lease should be used. (*Moore v. Miller*, 8 Penn. St. 272; *Peck v. Vandermark*, 99 N. Y. 29; 107 id. 192, 194; *Newton v. Bronson*, 13 id. 505; *Union Bank v. Coster*, 3 id. 209; *Peabody v. Speyers*, 56 id. 236; *Meyers v. Smith*, 48 Barb. 614; *Moore v. Pierson*, 71 Am. Dec. 409.) The contract evidenced by the letters exchanged between the parties to this suit, though informal, is in every respect complete. (*Wright v. Weeks*, 25 N. Y. 157, 160.) The refusal of the defendant to carry out his contract was a waiver of all conditions on the part of the plaintiff, if any existed. (*Ford v. Tiley*, B. & C. 325; *Franchot v. Leach*, 5 Cow. 506; *Traver v. Halstead*, 23 Wend. 66; *Cort v. A. R. R. Co.*, Eng. L. & Eq. 230; *Hochster v. De La Tour*, 20 id. 157; *Frost v. Knight*, 7 Law Rep. [Ex. Ch.] 111; *Burtis v. Thompson*, 42 N. Y. 246; *Shaw v. R. L. Ins. Co.*, 69 id. 292; *Sears v. Conover*, 4 Abb. Ct. App. Dec. 182; *Howell v. Gould*, 2 id. 419; *Woolner v. Hill*, 93 N. Y. 580; *Sellick v. Tallman*, 87 id. 106; *Hayner v. A. L. Ins. Co.*, 69 id. 439; *Moses v. Bierling*, 31 id. 462; *Meyer v. K. L. Ins. Co.*, 73 id. 516; *Meissel v. G. L. Ins. Co.*, 76 id. 115; *Chamberlain v. Ins. Co.*, 3 N. Y. Supp. 701; *Bond v. Carpenter*, 8 Atl. Rep. 539.) The contract was complete, even if the alterations were not agreed upon, and plaintiff is entitled to possession of the house on May 1, 1885, under his contract. (*Vassar v. Camp*, 11 N. Y. 441; *Robertson v. Kindley*, 12 Pac. Rep. 587; 2 Addison on Cont. [8th ed.] 1124; *Calhoun v. Atchison*, 96 Am. Dec. 229; *Glaze v. Duzon*, 4 South. Rep. 861; *Colerick v. Hooper*, 56 Am. Dec. 505.) The use of abbreviations is no objection to the validity of a lease. (*Wright v. Weeks*, 25 N. Y. 160; *Cross v. Elgin*, 2 Barn. & Ad. 106; *S. F. M. Co. v. Goddard*, 14 How. [U. S.] 446.) It appearing on the trial that the defendant had preferred a sale to a lease, and had

Opinion of the Court, per PECKHAM, J.

actually sold his property, so that the agreement between them was impossible of performance, the learned judge below properly ordered a reference to ascertain and assess the damages. (*Rider v. Gray*, 69 Am. Dec. 135; *Patterson v. Bloomer*, 95 id. 218; *Brewer v. Herbert*, 96 id. 582.)

W. F. Dunning for respondent. In order to constitute a contract, the minds of the parties must meet, and all the terms of the same be agreed to. If any part of the contract is not settled by the parties, as to that part there can be no contract. (*C. T. Co. v. N. Y. S. Exchange*, 15 N. Y. S. R. 19, 24; *Lyman v. Robinson*, 14 Allen, 242, 254; Whart on Cont. 16, § 5; *Ridgway v. Wharton*, 6 H. L. Cas. 268; *Brown v. N. Y. C. R. R. Co.*, 44 N. Y. 79, 85 *Myers v. Smith*, 48 Barb. 614; *Demeuth v. American Inst.*, 10 J. & S. 336; 75 N. Y. 502; *Foot v. Webb*, 59 Barb. 39; Parsons on Cont. [5th ed.] 557; Addison on Cont. 37; 1 Greenl. on Ev. § 275; *Sourwine v. Truscott*, 17 Hun, 432; *Maitland v. Wilcox*, 17 Penn. St. 231, 234; *Appleby v. Johnson*, L. R. [9 C. P.] 158; *Stanley v. Dowdeswell*, L. R. [10 id.] 102; 2 Addison on Cont. 1124; Pomeroy on Spec. Per. § 151.) The contract sought to be enforced must be wholly in writing and cannot be supplemented by parol. (*Wright v. Weeks*, 25 N. Y. 153.)

PECKHAM, J. This action was brought for the purpose of procuring specific performance of an alleged agreement for the leasing of certain premises in the city of New York, owned by the defendant, which, as was alleged, he agreed to lease to the plaintiff upon certain terms mentioned in the alleged agreement.

The defendant denied the making of any such agreement, and upon trial before a single judge it was found that the agreement as alleged by the plaintiff had been made, and that as the defendant had failed to execute the lease and had in the meantime sold the premises, the court found that the plaintiff was entitled to recover of the defendant the damages sustained by him by reason of defendant's neglect and refusal to

Opinion of the Court, per PECKHAM, J.

carry out the agreement already referred to. The court ordered a reference to ascertain and assess the damages and to report to the court. Upon the trial the plaintiff, for the purpose of proving the agreement set up in the complaint, offered in evidence, and the same was received, a certain letter of which the following is a copy :

“NEW YORK, *January* 29, 1885.

“MR. JAMES McCREERY :

“DEAR SIR — I will take your building, 483 Fifth avenue, on a twenty-one years' lease from May 1, 1885, to be altered by you similar to one Hume & Co. is now altering, and floors, etc., arranged as spoken about, etc., at the yearly rent of \$5,250 for each year of the term, net rent, no taxes, assessments, etc. Plans, etc., to be mutually agreed upon.

“Yours very respectfully,

“MAX MAYER.

“Building must be ready on May 1, 1885.”

On the same twenty-ninth of January, the defendant sent to plaintiff a written acceptance of his offer, of which the following is a copy :

“NEW YORK, *Jan'y* 29, 1885.

“MR. MAX MAYER :

“DEAR SIR — Yours of this date, making me an offer on building No. 483 Fifth avenue, for a twenty-one years' lease, has been received. I hereby accept your offer.

“Very truly yours,

“JAMES McCREERY.”

On the 2d day of February, 1885, the defendant wrote to the plaintiff a letter, of which the following is a copy :

“NEW YORK, *February*, 2, 1885.

“MAX MAYER :

“DEAR SIR—I have submitted the correspondence regarding a lease from me to you of premises No. 483 Fifth avenue to my counsel, and am advised that there are difficulties which will prevent the making of a lease as proposed. You will,

Opinion of the Court, per PECKHAM, J.

therefore, understand that the proposed lease cannot and will not be made.

“Very truly yours,

“JAMES McCREERY.”

The judge found that the above letters were the only memorandum in writing signed by the parties or by either of them in regard to the lease of the premises, and that they constitute the only agreement that was made in relation thereto. He also found that the plaintiff had at all times been and still was ready and willing on his part to comply in all respects with the provisions and requirements of the agreement, and to pay the stipulated rent for the premises.

The question is whether these letters constitute a completed agreement, forming in substance a lease of the premises referred to therein.

We think they do not. The substance of the agreement is that the lease of the building is to be given by the defendant, but before it is to be done, alterations of the building similar to the one Hume & Co. “are now altering” should be made, and that plans for such alteration should be thereafter mutually agreed upon. It is, in substance, an agreement that if the parties shall thereafter agree upon plans for the alteration of the building, that thereupon a lease of the building upon the terms specified in the letters will be given by the defendant to the plaintiff. The whole language is conditional; the making of the lease is plainly based upon the condition that an agreement shall be arrived at between the parties as to the plans and scope of the alterations which are to be thereafter made by the defendant. It is conceded that no such agreement was ever made. On the contrary, the defendant by his letter of the second of February, absolutely declines to make the lease, and the parties do not, as matter of fact, mutually agree upon the alterations to be made. We think it was entirely immaterial what reason was given by the defendant for or what motive actuated him in his refusal to make the lease. He had agreed to make it only provided the parties thereafter agreed upon the plans and alterations to be made, and if no such agreement were arrived

Opinion of the Court, per PECKHAM, J.

at, there was necessarily no lease. The case is unlike that of a paper containing two agreements, one valid and the other prohibited, where each is a complete agreement in itself and where the valid agreement may be enforced and the other disregarded. In this case there is no valid agreement excepting an agreement to give a lease provided the parties shall agree upon the plans for alterations thereafter to be made.

We do not think it is a case where the plaintiff might waive the condition for making the alterations and demand a lease without such agreement having been arrived at. If they are separable contracts, and if the alterations to be made were to be agreed upon solely for the benefit of the plaintiff, the right to waive such alterations might possibly exist, and his claim to exact performance of the agreement for the lease might be a valid one. But we do not think such is the case. The defendant has agreed that he would give a lease, provided he and the plaintiff should subsequently agree upon plans for alterations to be made. But he was under no obligation to agree upon such plans. On the contrary he might arbitrarily refuse to agree upon them and his refusal would be a sufficient answer to the demand for the execution of the lease. It would be no answer for the plaintiff to show that he had offered to agree on plans which were reasonable and proper, but that the defendant had, without reason, refused to agree upon them. The future agreement upon plans was not of such a nature that the plaintiff would have a right to ask that the defendant should specifically perform, upon proof that the plaintiff had offered plans which were reasonable in themselves and which the defendant ought to have agreed upon. It did not belong to that class of agreements where one party agrees to do work to the satisfaction of another, and which the court holds the other should, as matter of law, be satisfied with upon proof that it would be utterly unreasonable not to be so satisfied. Here the condition whether there was to be a lease executed depended wholly upon the fact of the agreement thereafter to be made between the parties as to plans for the alteration of the building. Before any negotia-

Opinion of the Court, per PECKHAM, J.

tions were entered into the owner of the property of course would have a right to insist upon such conditions as he chose, and whether they were reasonable or unreasonable would not be a matter of the slightest consequence. His decision would stand as reason enough. Having that right he could agree to give a lease upon such terms as the parties might thereafter mutually agree upon, and his refusal to thereafter agree upon any terms would still be a sufficient answer to any demand of the plaintiff, whether such reasons were good or bad. In this instance the parties did agree, the one to lease and the other to receive the lease upon certain conditions to be thereafter mutually agreed upon. Those conditions never were thereafter agreed upon, and hence no right to claim the lease ever existed. The motives of the defendant for his refusal are wholly immaterial; whether they were because he thought he could make a more favorable agreement with some other person, or because he thought there was some difficulty in the deeds upon which he held title, which prevented him from leasing the premises for the purposes intended, is a matter of no importance. The sole condition upon which the lease was to be executed never existed, and hence no right to claim the lease ever arose upon the part of the plaintiff. But we think that so far as the evidence shows there was never any waiver of the plaintiff's right to claim the alterations spoken of in his letter to the defendant. The mere fact that at what he claimed to be the commencement of the lease, he offered in advance a month's rent in full, was not a waiver of his right to demand the alterations spoken of in his letter. It was simply a tender of rent on his part, which we think did not conclusively waive a right, if it had existed, to claim the alterations as if they had been mutually agreed upon.

Nor did the defendant waive his right to have the alterations mutually agreed upon before the execution of the lease, by his letter of the second of February, in which he stated that he was advised that there were difficulties which would prevent the making of the lease as proposed. If we are right as to the fact that the motives of the defendant in refusing to

Statement of case.

make the lease are wholly immaterial, it follows that any statement of such motives, or any statement of the reasons which guided him, would be also immaterial. The material part was his failure to agree upon the plans of the alterations. Whether that failure was based upon the advice of his counsel as to legal difficulties in making a lease, or upon any other reason, would constitute no waiver of his right to insist upon such an agreement before the plaintiff's right to demand a lease would arise.

We think the General Term was right in reversing the judgment of the Special Term and granting a new trial, and its order to that effect should be affirmed and judgment absolute given against the plaintiff upon his stipulation, with costs.

All concur.

Order affirmed, and judgment accordingly.

ALLETTA A. AKIN, Appellant, *v.* SARAH A. KELLOGG et al.,
Respondents.

B., by his will, gave to his widow, in lieu of dower, one-third of his personalty absolutely, and the net income for life of one-third of his real estate, which was vested in a trustee for that purpose. About three years after B. died, the widow brought an action in which she asked that she might be permitted to make her election, renounce the testamentary provision and have her dower assigned, on the ground that she was ignorant of the extent of her husband's estate until the executor filed his accounts, and was induced to omit to take the steps necessary to claim dower by representations of the executor made in the presence of S., the principal beneficiary under the will, and by S. as to the value of her dower right. *Held*, that plaintiff was not entitled to the relief sought. The provision of the statute (1 R. S. 741, §§ 13, 14) requiring a widow to elect within one year between a provision made for her in her husband's will and the right to have her dower in his real estate admeasured, and declaring that she shall be deemed to have elected to take the testamentary provision, unless within that time she shall enter upon the lands to be assigned to her for dower, or commence proceedings for the assignment thereof, has the force of a statute of limitations, and she is at once, on the death of the testator, charged with the duty of informing herself, so as to make her election.

Statement of case.

It appeared that the lands in which plaintiff claimed dower, had been conveyed by the testator to S. for a nominal consideration four years before his death, much of which time he had lived upon them with plaintiff; that five days after his death the deed was recorded. Plaintiff's evidence was to the effect that S. said to plaintiff, the day after the funeral that she "would receive much more than if she had received her dower," and shortly afterward that there would be "money enough for us all," and that the executor stated in the presence of S. that plaintiff would receive \$1,200 to \$1,300 per annum. *Held*, that these had not the weight of representations of facts upon which an estoppel could be based; but were mere expressions of opinion, and so could not exempt plaintiff from the duty of examining herself into the condition of affairs.

Expressions of opinions by interested persons cannot, when subsequently shown to have been groundless or false, be regarded as misrepresentations. Reported below, 48 Hun, 459.

(Argued January 29, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made at the May term, 1888, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at circuit.

The nature of the action and the material facts are stated in the opinion.

Matthew Hale and *Ward & Cameron* for appellant. The general rule applicable to cases where a party is compelled to make election, is: If one should make a choice in ignorance of the real state of the funds, or under a misconception of the extent of the claims on the fund elected by him, it will not be conclusive on him. (*Wells v. Robinson*, 13 Cal. 133, 142; *Kerr on Fraud and Mistake*, 453; *Pusey v. Desbouveir*, 3 P. Wms. 315.) This rule is applicable to dower. (*Hindley v. Hindley*, 29 Hun, 318; *Larabee v. Van Alstyne*, 1 Johns. 307, 308; *Macknett v. Macknett*, 29 N. J. Eq. 54; 2 *Scribner on Dower* [2d ed.] 519, 523; *Cameron on Dower*, 489, § 94; *Id.* 490, § 97; *Richart v. Richart*, 30 Ia. 465; *Dabney v. Bailey*, 42 Ga. 521.) A case still stronger arises in favor of the plaintiff where fraud and deceit are alleged. (*Smart v. Waterhouse*, 10 Yerg. 94; *Story on Agency*, § 139; *Bennett*

Statement of case.

v. *Judson*, 21 N. Y. 238; *I. P. & C. R. Co. v. Tying*, 63 id. 653; *Krumm v. Beach*, 96 id. 398.) The demurrer to the amended complaint was sustained at Special Term on the theory that under no possible circumstances can a widow, who has omitted to make her election within one year after the death of her husband, be relieved from the provisions of the statutes. (1 R. S. 741, 742, §§ 13, 14; *Hindley v. Hindley*, 29 Hun, 318; *Hone v. Van Schaick*, 7 Paige, 221; *Howland v. Heckscher*, 3 Sandf. Ch. 519; 20 Wend. 564; 3 Sandf. Ch. 523; *Manice v. Manice*, 1 Lans. 348; 43 N. Y. 303; *Egbert v. Thompson*, 17 N. J. L. 450; *Osman v. Porter*, 39 N. J. Eq. 141, 142, 144; 41 id. 663.) The Special Term erred in sustaining the demurrer. (16 Abb. [N. C.] 268; *Thomas v. Beebe*, 25 N. Y. 244; *Maher v. Ins. Co.*, 67 id. 284, 292; *Bank of Montreal v. Thayer*, 2 McCrary, 1; *Stevens v. Austin*, 1 Metc. 557; *Stevenson v. Maxwell*, 2 N. Y. 408-415; *Bruce v. Tillson*, 25 id. 194; *Mills v. Van Voorhees*, 20 id. 412-422; *McClaskey v. City of Albany*, 64 Barb. 310; Code Civ. Pro. § 723; *Bennett v. Judson*, 21 N. Y. 237, 239, 240.) The receipt and retention by the wife of the fruits and product of a fraud of her husband involve a liability on account of it, although herself innocent of participation in it. (*Krumm v. Beach*, 96 N. Y. 398, 404, 405; *Baker v. U. M. L. Ins. Co.*, 43 id. 208; *Garner v. Mangam*, 93 id. 642; *Noel v. Kinney*, 106 id. 74, 78.) If the election was made in ignorance of the real state of the facts, or under a misconception of her rights, it is not binding in equity. (*Wells v. Robinson*, 13 Cal. 133, 142; Kerr on Fraud and Mistake, 398, 453; *Pusey v. Desbouvrie*, 3 P. Wms. 315; *Hindley v. Hindley*, 29 Hun, 318; *Osman v. Porter*, 39 N. J. Eq. 141; 41 id. 663; *Thompson v. Egbert*, 17 N. J. L. 459.) The court erred in excluding material and competent evidence offered by the plaintiff. (*Bayliss v. Cockroft*, 81 N. Y. 363, 371; *McKown v. Hunter*, 30 id. 625; *Bedell v. Clease*, 34 id. 386; *D. Co. Ins. Co. v. Hatchfield*, 73 id. 226, 229.) The fact that the premises in question were subject to a perpetual yearly rent, did not show that they were not subject to dower. (1 R. S. 722, § 2; Id.

Statement of case.

740, § 1.) The grounds upon which the General Term sustained the judgment of nonsuit, are insufficient. (*Hickey v. Morell*, 102 N. Y. 454, 463; 1 R. S. 761, § 33; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Ackerman v. Hunsicker*, 85 N. Y. 43, 49; *King v. McVicker*, 3 Sandf. Ch. 192, 209; *H. Ins. Co. v. Halsey*, 8 N. Y. 271; *George v. Wood*, 9 Allen, 80.) The action was triable by jury. (Code, § 968, subd. 2; *Train v. H. P. Ins. Co.*, 62 N. Y. 598; *Trustees, etc., v. Kirk*, 68 id. 464; *Ormes v. Dauchy*, 82 id. 443, 448, 449; *Moore v. M. Bank*, 55 id. 41, 44; *Birdsall v. Patterson*, 51 id. 43; Code, §§ 1010, 1023.)

L. Laflin Kellogg for respondents. A representation to be material should be in respect of an existing and ascertainable fact, as distinguished from a mere matter of opinion or advice, and must be false and one that the party knew at the time to be false. Such are representations about property or facts that could not be ascertained. (*Cooper v. Schlesinger*, 111 U. S. 148; *Hubbell v. Meiggs*, 50 N. Y. 480; Kerr on Frauds, 83; *Harvey v. Young*, Yelv. 20; *N. B. R. Co. v. Conybeare*, 9 H. L. 711; *Colby v. Gadsden*, 34 Beav. 416; *Jennings v. Broughton*, 5 D., M. & G. 136; *Stephens v. Venable*, 31 Beav. 124; *Irvine v. Kirkpatrick*, 7 Bell, 186; *Palsey v. Freeman*, 2 Smith L. C. 1337; *Ellis v. Andrews*, 56 N. Y. 83; *Chrysler v. Canaday*, 90 id. 272; *Furmann v. Titus*, 16 J. & S. 284.) If the statement as made upon the trial can in manner be construed as sufficient as a statement of fact, it cannot be made so in any other way than by showing that it was known by the maker to be a false statement. (*Marsh v. Faulkner*, 40 N. Y. 562; *Oberlander v. Spies*, 45 id. 175; *Craig v. Ward*, 3 Keyes, 393; Best on Ev. 302, 349; Lawson on Presumptions, 93; Kerr on Fraud, 384; *Baird v. Mayor, etc.*, 96 N. Y. 592; Bigelow on Frauds, § 142.) In the case of a special agency it is elementary that if the special agent exceeds the special limited authority conferred upon him the principal is not bound by his acts, but they become a mere nullity as far as he is concerned. (Story on Agency, § 126;

Opinion of the Court, per GRAY, J.

Ritch v. Smith, 82 N. Y. 627.) The fact that the estate afterward became insolvent and the plaintiff received little or nothing out of it cannot relieve her from her failure to elect. (*Manice v. Manice*, 1 Lans. 348; *Hone v. Van Schaick*, 7 Paige, 222; Scribner on Dower, 432, 525.) The widow has lost her dower, because she has failed to take any action, as provided by law, within one year of the death of the testator, and the court has no power to extend the time for election upon the grounds asked for in the complaint. (2 R. S. 742, §§ 13, 14; Redf. on Wills, 383; *Palmer v. Voorhis*, 35 Barb. 479; *Nicholas v. Nicholas*, Ky. Dec. 338; *Waterbury v. Netherland*, 6 Heisk. 512; *McDaniel v. Douglas*, 6 Hump. 229; *Ex parte Moore*, 7 How. [Miss.] 665; *Thophy v. Abbott*, 42 N. Y. 443; *Crawford v. Lockwood*, 9 How. Pr. 547; *Knebble v. Newcomb*, 22 N. Y. 249; *Hodgdon v. Chase*, 29 Me. 51.) The plaintiff is not entitled to dower in the property described in the complaint, for the reason that it is not an estate of inheritance. (1 Steven's Comm. 218; Littleton, § 1; Cook's Littleton, 2370; 1 Washb. on Real Prop. 194; 1 Scribner on Dower, 363; *Volkner v. Hudson*, 1 Sandf. 215; N. Y. Const. 1846, 1876; *Stevens v. Reynolds*, 6 N. Y. 455; *Stangler v. Stangler*, 1 Md. Ch. 36; *Goodwin v. Goodwin*, 33 Conn. 314; Park on Dower, 47; *Ware v. Washington*, 6 S. & M. 637.)

GRAY, J. The complainant is the widow of Benjamin Aiken, deceased, who, in his will, made certain provisions for her out of his estate, which were expressed to be in lieu of her dower rights. They gave to her one-third of the personalty absolutely, and the net income of one-third of the real estate, which was vested in a trustee for that purpose, during her life. She did not commence any proceedings, or take any steps towards a recovery or assignment of her dower in the real estate, within the year succeeding the testator's death, and this action was commenced by her some three years afterwards. Through it she seeks to obtain a decree relieving her "from the penalty imposed by statute for not having, within one year after the

Opinion of the Court, per GRAY, J.

death of her husband, entered on the land to be assigned to her for her dower, or commenced proceedings for the recovery or assignment thereof," and permitting her to make her election and to renounce the testamentary provision.

The allegations in the complaint are that plaintiff was ignorant of the nature and extent of the estate of said Benjamin Aiken at the time of his death, and for a long time thereafter, and until his executor filed his accounts and asked for a final settlement; that Asa B. Kellogg, the husband of the defendant Sarah A. Kellogg, had been, for many years prior to the death of the said Benjamin Aiken, the agent and confidential adviser of said Benjamin Aiken, and had transacted all his business for him, and had been familiar with the affairs and property of the said Benjamin Aiken; that after the death of the said Benjamin Aiken this plaintiff had great confidence in said Asa B. Kellogg, and put entire faith in his representations; that the said Asa B. Kellogg was also the agent of his wife; that shortly after the death of the said Benjamin Aiken he stated and represented to plaintiff that it would be more advantageous to her to accept the provisions of the will than to claim her dower in the real estate left by him, and that such representations were made to plaintiff in the presence of his wife, acting as her agent and for her benefit. She avers that the statements were made for the benefit of Mrs. Kellogg, the owner of the lands out of which the dower is sought, and that by them she was induced to omit and neglect to take steps towards a renunciation of the testamentary provisions and towards securing her dower interest in the real estate, which she would have taken had she not relied upon them, or had she been informed of the actual condition of the estate.

I think, even if we assume the truth of these charges of her complaint, that her right to relief in equity is most doubtful. She does not ask for relief against some positive act of her commission, procured by the fraud of another; she asks for it because, through reliance upon the statements of others, she remained inactive, and thus suffered the period of time to

Opinion of the Court, per GRAY, J.

expire, within which she should have been diligent to ascertain and to secure her rights.

Now equity does not interfere to grant relief, when one has failed in diligence, or in the performance of an obvious and imperative duty imposed by law. It does not rise above the common law and the statute. Its office is not to relieve against a hardship, merely as such ; nor should its interference be moved by mere opinion in the judge. I do not think the equitable powers of a court can be properly invoked to interfere with the established rules of law ; though the same result may be often reached by an injured party, in preventing another from benefitting by an act or contract, procured by his artifice, or deceit. The theory of estoppel might be available in some such case. Here the complainant was apprized by the will of an option offered to her with reference to her future property rights, and it became at once her legal duty to be diligent and careful in acting, if she proposed to take what the law assured to her, in place of what the will gave. The Revised Statutes have but followed the common law, in their provision for an election by the widow between a testamentary gift in lieu of dower and the dower right itself ; but they have further provided that the widow shall be deemed to have elected her devise, or pecuniary provision, unless, within one year after the death of her husband, she shall enter upon the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof. Where, then, a provision is, by the express terms of the will, made in lieu of dower, the widow is obliged to make an election, whether to accept it, or to renounce it for what the law gives to her. She cannot have both, and she is at once chargeable with the duty of informing herself, so as to make her election ; and that she shall have a certain period of time for that purpose, the legislature has provided what was deemed a reasonable season of delay, and its enactment that the election must be made within one year has the same force as a statute of limitation upon the widow's rights. The object of the legislature was to compel the widow to make her election a reasonable

Opinion of the Court, per GRAY, J.

time after the death of her husband. (*Hawley v. James*, 5 Paige, 446.) The right to dower out of the estate is a strict legal right, of which the widow cannot be deprived, save by her own act in waiving it, or in accepting some other and inconsistent provision; nor does the statute attempt to deprive her of it, but it provides that where something else is given to her in lieu of it, if then she does not do some act evidencing a renunciation of the gift, in favor of what the law will admeasure to her, within the period of a year after the husband's death, such conduct shall be deemed an acceptance of the husband's provision for her. This being then a statute of limitation upon the widow's right to enforce her claim to dower, the policy of the law in such a case, as in all cases involving the operation of such a statute upon a person's rights, or demands, forbids the granting of relief against its provisions. The statute has acted and the right has gone.

Nor is this the ordinary case of election, where knowledge is necessary in order to make it validly, and, hence, where there was a mistake of facts, or a misconception as to rights, relief in equity is allowable. Here the statute does not offer, or create, the election. That existed already. The office of the statute was to impose a limitation of time upon the exercise of the power to elect, and to bar any subsequent exercise of it.

But a phase of this case is presented as to a possible estoppel upon Mrs. Kellogg, through the acts alleged. A party may be estopped from taking advantage of the legal helplessness of another, by reason of his conduct or representations having brought about such a condition. Is that the case here? Assuming that the allegations of the complaint might be deemed, with some latitude of judgment, to make out such an apparent estoppel upon Mrs. Kellogg, do the proofs make out such a case? I am unable to agree in such a view.

The testator died in 1881. The lands in question had been conveyed to his daughter, Mrs. Kellogg, for a nominal consideration, in 1877. Testator and his wife had lived upon them much of the time. Five days after his death the deed of con-

Opinion of the Court, per GRAY, J.

veyance was recorded. The statements, which the plaintiff refers to as having been made by Mr. Kellogg, can scarcely be deemed such as would bind Mrs. Kellogg, even though made in her presence by her husband. But such as they were, they amounted to nothing more than expressions of opinion. To say, the day after the funeral, when the will had been read, that plaintiff would "receive much more than if she received her dower;" or, again, shortly thereafter, to say that there would be "money enough for us all," have not the weight of representations of facts and certainly do not authorize a reliance upon them without investigation. Even if we assume that the representation by Mr. Kellogg, to the effect that the plaintiff would receive \$1,200 to \$1,300 a year, was made within the year after testator's death, and not, as I think it clearly appears from the proofs, some time in 1883, more than a year after testator's death, that would not exempt plaintiff from the duty of herself examining into the condition of affairs. What was that but opinion?

With matters of opinion equity is not concerned. A representation which states a probability, or a possibility, or is conjectural, is not to be relied on, or acted upon. She could have ascertained the extent, condition and tenure of the real estate, and the nature of the assets and liabilities of the personal estate. She was bound to know that the law compelled her to make her election as to whether she would abide by the will or not within a year. Ignorance of that law is no excuse, and expressions of opinion by interested persons cannot, though subsequently shown to be groundless or false, be regarded as misrepresentations. But I am unable to see that this plaintiff was really so ignorant as she pleads. There is enough in her own letters in the case to show that she was pretty well informed upon estate affairs generally, and in a letter from Kellogg to her, he speaks of this farm as a separate account, in which he acted by power of attorney. This was within the year after testator's death, and should have directed her attention to that subject. In this state the statute is imperative upon this subject of a widow's election, and there

Statement of case.

is no other provision relieving from its strictness, as in some of the states where the widow's dower right is retained to her, if the property of the deceased is taken for his debts. Cases under such laws are inapplicable. Nor are authorities in point where the facts show that the widow was actually prevented from exercising any election, or where the will, or the provisions in lieu of dower, have entirely failed. If a widow has accepted a testamentary provision and it, or the will, shall fail for illegality, she is not bound, and equity will relieve, provided the rights of creditors or purchasers are not concerned, and will permit her to claim dower. (*Hone v. Van Schaick*, 7 Paige, 221-223.) The reason of this principle is too obvious to be dwelt upon. There must be a possibility for an election, or there is no election. An illegal or invalid provision gives nothing.

None of the exceptions to rulings call for our consideration, and I think the judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

119	450
121	843

119	450
167	188

JOHN F. BAXTER, Respondent, v. BROOKLYN LIFE INSURANCE COMPANY, Appellant.

Under the provisions of the "act to regulate the forfeiture of life insurance policies" (§ 1, chap. 341, Laws of 1876, as amended by chap. 321, Laws of 1877), which provides that no life insurance company shall have power to declare a policy thereafter issued or renewed by it, forfeited by reason of non-payment of premium, except upon service of a notice upon the assured as prescribed, and a failure to pay within thirty days after such service, the duration and validity of a policy, whatever may be its terms, is not dependent upon payment of premium on the day named, but upon payment within thirty days after notice given; the statute is part of the contract, and governs the rights and obligations of the parties, the same as if all its terms and conditions had been incorporated therein. In an action upon such a policy, before the defendant can raise any question in regard to non-payment of premium, it is necessary for it to show the giving of the statutory notice and the lapse of thirty days thereafter without payment. (ANDREWS, EARL and GRAY, JJ., dissenting.)

Statement of case.

Where, therefore, in such an action there was no proof of payment of the last quarter's premium falling due before the death of the insured, and no proof of the giving of the statutory notice, *held* (ANDREWS, EARL and GRAY, JJ., dissenting), it was to be assumed that the policy was in force at the time of the death of the insured, and the obligation to pay upon death, during the life of the policy, was unimpaired, although the premium was unpaid; and that as the liability of the defendant was fixed by the death, it was not necessary to pay, or tender before suit brought, the premium due and unpaid; the unpaid premium with interest being simply a claim to be deducted by defendant from the sum due upon the policy. Reported below, 44 Hun, 184.

(Argued January 29, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 19, 1887, which denied a motion for a new trial and ordered judgment for plaintiff on a verdict in his favor.

The nature of the action and the material facts are stated in the prevailing opinion.

N. C. Moak and *W. H. Ford* for appellant. The General Term held that, under the pleadings, failure of the defendant to prove a forfeiture of the policy in the mode required by the act of 1876-7, was fatal to the defense. It is submitted that this was error. (Laws of 1876, chap. 341; Laws of 1877, chap. 321; *Howell v. Ins. Co.*, 44 N. Y. 276; *Bogardus v. Ins. Co.* 101 id. 328; *Malone v. Sherman*, 49 J. & S. 530; *Bacon v. Munn*, 2 Wend. 399; *Crandall v. Clark*, 7 Barb. 169; *P. Bank v. Mitchel*, 73 N. Y. 406; *Oakley v. Morton*, 11 id. 25.) Every case must be tried on the issues presented by the pleadings, and a judgment cannot be sustained on a ground not put in issue, and distinctly and fairly litigated. (*Howell v. Ins. Co.*, 44 N. Y. 276; *Bogardus v. Ins. Co.*, 101 id. 328; *Heineman v. Heard*, 62 id. 448; *Oakley v. Morton*, 11 id. 25; *Higgins v. Delaware R. R. Co.*, 60 id. 553; *Kimberly v. Patchen*, 19 id. 330; *Russell v. Carrington*, 42 id. 118; *Southwick v. F. N. Bank*, 84 N. Y. 420; *Wright v. Delafield*, 25 id. 266, 270; *Day v. Town of*

Statement of case.

New Lots, 107 id. 148, 154, 155 ; *Romeyn v. Sickles*, 108 id. 650 ; *Kelsey v. Western*, 2 id. 500, 506 ; *Truesdell v. Searles*, 104 id. 164, 167 ; *R. Bank v. Eames*, 1 Keyes. 588 ; *Baily v. Rider*, 10 N. Y. 363 ; *Arnold v. Angel*, 62 id. 508 ; *McClung v. Foster*, 47 Hun, 421.) The plaintiff could not avail himself of the protection conferred by the statute of 1876, as amended in 1877, as an excuse for the non-payment of the premiums which he alleged he had paid, without pleading the statute or alleging the facts which the statute provides shall confer such protection. (Code, § 530 ; *Goelet v. Cowdrey*, 1 Duer, 132 ; *Austin v. Goodrich*, 49 N. Y. 266 ; *Brown v. Harmon*, 21 Barb. 508 ; *Duffy v. O'Donovan*, 46 N. Y. 223.) The complaint of the plaintiff alleging payment of all the premiums on the policy and resting his case on the truth of that allegation, misled the defendant in its answer and defense. A party so misled is entitled to the protection of the court from a misuse or abuse or its established methods of procedure. (*Day v. Town of New Lots*, 107 N. Y. 148 ; *Clark v. Dillon*, 97 id. 370 ; *Wright v. Delafield*, 25 id. 266 ; *Romeyn v. Sickles*, 108 id. 650 ; *Southwick v. F. N. Bank*, 84 id. 420 ; *Malone v. Sherman*, 49 J. & S. 530 ; *People v. McComber*, 18 id. 315, 323 ; Bigelow on Estoppel, 687 ; *Northampton Bank v. Kidder*, 18 J. & S. 246 ; *Rodermund v. Clark*, 46 N. Y. 354.) By alleging payment of the premiums, the plaintiff is estopped from thereafter abandoning that position for another, if the defendant was influenced by or acted upon that allegation. (*W. C. Co. v. Hathway*, 8 Wend. 483 ; 4 Kent's Comm. 293 ; *Freeman v. Cook*, 2 W. H. & G. 653 ; *C. Bank v. N. Bank*, 50 N. Y. 575 ; *Dezell v. Odell*, 3 Hill, 215 ; *Reynolds v. Garner*, 66 Barb. 313 ; *Blair v. Wait*, 69 N. Y. 113 ; *Bean v. Pettingill*, 7 Robt. 7 ; *Chapman v. O'Brien*, 34 J. & S. 524 ; *L'Amoureux v. Vischer*, 2 N. Y. 278 ; *Voorhees v. Olmstead*, 3 Hun, 744 ; *Rensselaer v. Kearney*, 11 How. [U. S.] 326 ; Bigelow on Estoppel, 687 ; *Rodermund v. Clark*, 46 N. Y. 354 ; *Malone v. Sherman*, 49 J. & S. 530.)

Opinion of the Court, per O'BRIEN, J.

Charles E. Cary for respondent. The plaintiff can recover without showing payment of the quarterly premium. (Laws of 1887, chap. 321; *In re Booth*, 11 Abb. [N. C.] 145.) Independent of the statute referred to, the burden is upon the defendant of proving a forfeiture of the policy. (*Van Valkenburg v. A. P. I. Co.*, 9 Hun, 583; 70 N. Y. 605; *Jones v. B. L. I. Co.* 61 id. 79; 50 id. 626.) The opinion of the General Term is clearly right and fully sustains the verdict in this case by a course of reasoning which is unanswerable. (*Carter v. B. L. Ins. Co.*, 110 N. Y. 15.)

O'BRIEN, J. The plaintiff is the assignee of a policy of insurance upon the life of one Joel J. Mattison issued by the defendant dated May 24, 1884, whereby in consideration of a quarter-annual premium of \$20.97 to be paid upon delivery of the policy, and thereafter on the twenty-fourth day of August, November, February and May in each year, the defendant insured Mattison's life in the sum of \$3,000, payable to his wife, at the office of the company in the city of New York, within sixty days after receipt of satisfactory proof of death *during the life of the policy*. The policy was made subject to numerous conditions, none of which are important for the purpose of this appeal except the condition that it should be void upon failure to pay the premium when due. The complaint alleged the delivery of this contract to the insured, his death on the 7th day of September, 1884, the presentation to the defendant of satisfactory proofs of death, according to the terms of the policy, the refusal of the defendant to pay, and that the insured had made the payments of premium according to his agreement with the defendant. No issue was made by the defendant upon any of the allegations of the complaint except the averment that the insured had paid the premiums according to the terms of the policy, which it denied, and specially alleged that the premium which became due on the 24th day of August, 1884, had not been paid. On the trial the plaintiff put in evidence the policy and a written assignment, by the wife

Opinion of the Court, per O'BRIEN, J.

of the insured, to him of the claim or cause of action, and rested. The defendant moved for a nonsuit on the ground that the insured had failed to comply with the terms and conditions of the policy by neglecting to pay the quarterly premium stipulated to be paid by the terms of the policy on the twenty-fourth day of August prior to the death of the insured. This motion was denied and the defendant excepted, and the only question in the case is thus presented. The death of the insured occurred within less than four months from the time the policy was delivered. The production of the policy at the trial proved the payment of the first quarterly premium. But it was essential to the maintainance of the plaintiff's cause of action to show that the policy was a valid, subsisting contract at the time of the death of the insured. The policy itself contained the stipulation that it was a contract made and to be executed in the state of New York and construed only according to the laws of that state. Aside from the provisions of the policy, and under general rules of law, the contract was subject to the terms and conditions expressed in chapter 341 of the Laws of 1876, as amended by chapter 321 of the Laws 1877. This statute was a part of the contract in question and governed the rights and obligations of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy.

The promise of the defendant was to pay to the beneficiary named the sum of \$3,000 upon the death of the insured, in case that event occurred *during the continuance of the contract*. It, therefore, becomes important to inquire whether the policy in question was in force at the time of the death of the insured on the 7th day of September, 1884. If, upon that day, it was a valid, subsisting contract, notwithstanding the failure to pay the premium due on the preceding 24th day of August, then the very contingency upon which the defendant agreed to pay the amount of the insurance has happened. The statute above referred to (Laws 1877, chap. 321) declares that no life insurance company doing business in this

Opinion of the Court, per O'BRIEN, J.

state shall have power to declare forfeited or lapsed any policy thereafter issued by reason of non-payment of premium, unless, after it becomes due, a notice stating the amount of such premium, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, at his last known post-office address, postage paid by the company, and further stating that unless the premium then due shall be paid to the company or its agent within thirty days after the mailing of such notice, the policy and all payments thereon will become forfeited and void. It is also provided by the same section that in case such payment is made within the thirty days limited therefor, it shall be deemed a full compliance with the requirements of the policy in respect to the payment of premium, and it declares that no such policy shall in any case be forfeited, until the expiration of thirty days after the mailing of such notice. These provisions are to have full effect, any condition to the contrary notwithstanding. There was no proof given at the trial by either party to show whether this notice was served or not. It is obvious that this statute, when imported into the contract, modified its conditions in very material respects. The duration and validity of the policy is not then dependent upon payment of the premium on the day named therein, but upon payment within thirty days after the notice had been given. The condition upon which the policy can be forfeited, or in any way impaired as a subsisting contract of insurance, is a failure on the part of the insured to pay the premium within thirty days after notice. The complaint alleges that the insured, after the time of the death, made the payment on the policy as agreed with the defendant. That he actually paid the premium necessary to keep the policy in life till the twenty-fourth of August prior to his death, was established and admitted. It was not necessary to prove that he also paid the premium on the twenty-fourth of August, because the contract was not impaired by a failure to pay on that day, but by a failure to pay within thirty days after the defendant had served the statutory notice. The statute pre-

Opinion of the Court, per O'BRIEN, J.

scribes this notice as a necessary condition of forfeiture, and unless it was served the insured was not in default, because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of premium. In the absence of proof, on the part of the defendant, as to the service of the notice, this allegation of the complaint was sufficiently established within the meaning of the contract, as evidenced by the policy and the statute when read together. Before the defendant could raise any question in regard to the non-payment of the August premium, it was necessary for it to show that it had complied with the statute by serving the notice, as this step was essential in order to put the insured in default, or to raise any point based on his omission to pay the last quarterly premium.

It must, therefore, be assumed, in the absence of such notice, that the policy in question was in full force at the death of the insured, and even if the payment of the last premium was omitted the obligation and promise of the defendant to pay upon death, during the life of the policy, was unimpaired. The purpose of the statute referred to was to establish a rule which would preserve to the assured the benefits of premiums paid, and to prevent the lapse of policies of life insurance without ample notice, and an opportunity to save them from forfeiture by payment of premiums due within the specified time, and at the same time secure to the company, in case it is obliged to pay, the full amount of the premium which the policy calls for. When the provisions of this statute are adopted in a contract of insurance, for the purpose of modifying the forfeiture clause and the other strict conditions contained therein, then the clause and these conditions should be so construed as to give to the assured the full benefit contemplated without altering any other provision of the policy, if this can be done without violating any rule of law. When the scope and purpose of the law as deduced from the decisions of this court and the courts of other states involving a construction of the same or similar statutes is considered, no good reason is perceived for interfering with

Dissenting opinion, per ANDREWS, J.

the result in this case in the court below. (*Phelan v. N. M. L. Ins. Co.*, 113 N. Y. 147; *Carter v. Brooklyn Life Ins. Co.*, 110 id. 15; *Carter v. John Hancock Mutual Life Ins. Co.*, 127 Mass. 153; *Boyd v. Cedar Rapids Ins. Co.*, 70 Ia. 325.)

It was not necessary, in order to enable the plaintiff to recover the sum insured, to pay or tender before action brought the premium that was payable on the twenty-fourth of August prior to the death of the insured. If the policy was in full force when the assured died, as we think it was, that event fixed the liability and obligation of the defendant, notwithstanding the omission to make that payment. Nothing remained to be done by the widow of the assured or her assignee, except to present to the defendant the proofs of death required by the policy. The death of the assured terminated the contract. The defendant's promise to pay, if it was not discharged, had matured, and the persons entitled to the benefits of the policy had only to establish the fact of death within the time and in the manner prescribed therein. The contract was kept in life by force of the statute, until the contingency upon which payment depended occurred. The death of the assured created the relation of debtor and creditor between the defendant and his widow, and the unpaid premium, with interest from the date when payable, was a claim to be deducted by the defendant from the sum due upon the policy. This puts the defendant in precisely the same position in which it would have been if the premium had been duly paid. (*Carter v. John Hancock M. Life Ins. Co.*, *supra*.)

It was conceded upon the argument in this case that the unpaid premium, and interest thereon, was deducted from the verdict, and thus no injustice has been done.

The judgment should be affirmed.

ANDREWS, J. (dissenting). I dissent from the prevailing opinion in this case. The sole purpose of the statute of 1877, a purpose indicated as well by the title as the body of the act, was to abrogate the rule that the failure to pay the pre-

Dissenting opinion, per ANDREWS, J.

mium on a life policy on the day specified therein, created a forfeiture and rendered the policy void. The act, therefore, provided that non-payment of the premium at the day should not work a forfeiture, and that the policy should continue in force, notwithstanding such omission, until notice by the company and default of the insured for thirty days thereafter to make payment. The construction placed on the statute in the prevailing opinion, that by its operation the premium does not become due until after notice and expiration of the thirty days, and that meanwhile an action may be brought and a recovery had on the policy, although the premium has not been paid or tendered, is, I think, untenable. The premium is due from the time it becomes due according to the terms of the policy, and remains due at all times thereafter until actually paid, but under the statute default in making payment at the pay-day, nevertheless leaves the contract of the company subsisting, and an action may, therefore, be maintained upon it in case of the death of the insured, unless it is shown that the notice has been given and that the premium was not paid within thirty days thereafter.

But it is a condition precedent to the maintenance of such action that the plaintiff must before suit brought have paid or tendered the premium unpaid. The plaintiff under the statute of 1877, is not required as before to show that it was paid or tendered on the day fixed in the policy, but he must aver and prove that payment was made at some time before the action was commenced, or else no right of action has accrued. This is in accordance with the well-settled rule that in mutual promises the plaintiff seeking to charge the defendant, must aver and prove performance on his part of that which was the consideration of the defendant's promise, and this as well where the promise of the plaintiff was to be performed before the day fixed for performance by the defendant, as where the performance of respective promises were concurrent and dependent. The construction I have given to the statute of 1877 fully accomplishes its purpose, while relieving it of the anomaly that a contract to pay an insurance on condition of the pay-

Statement of case.

ment of the premiums may be enforced, although the party claiming performance has never paid or offered to pay what was stipulated.

The cases in Massachusetts and other states have, I think, no bearing upon the present one. They were well decided, and involved no such question as is presented in this case under the statute of 1877.

The judgment should be reversed.

All concur with O'BRIEN, J., except ANDREWS, EARL and GRAY, JJ., dissenting.

Judgment affirmed.

JEREMIAH BULGER, Respondent v. ISAAC A. ROSA, as Sheriff,
etc., Appellant.

In a case triable by a jury, the direction of a verdict is only justified where the evidence conclusively establishes the right of the party in whose favor it is made. The test of the right is, whether the court would be bound to set a verdict aside as against evidence if rendered against the party in whose favor it was directed.

It seems, the provision of the statute relating to fraudulent transfers and conveyances (2 R. S. 137, § 4), which declares that the question of fraudulent intent arising thereunder shall be deemed a question of fact and not of law, does not interfere with the prerogative of the court to direct a verdict, although the case arises under the statute, provided the fraudulent intent is conclusively established on the face of the instrument of transfer or by the uncontradicted evidence.

It seems, also, an insolvent firm may not apply the firm assets in payment of the individual debts of the partners, nor can the equity of the firm creditors be defeated by a transfer by one of two copartners, of his interest therein, to the other; they still, as to firm creditors remain firm assets.

It seems, also, where an individual creditor of one of the members of a firm knowingly takes a transfer of firm property in payment of his individual debt, his act is not merely a violation of an equitable right of a firm creditor, but it constitutes a fraud.

A firm, although insolvent, has a right, however, to make preferences among its creditors, and one partner may transfer the partnership effects directly to a firm creditor in payment of his debt without the knowledge or consent of his copartner.

119	459
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Statement of case.

Where S. one of two copartners in a firm which to their knowledge was insolvent, as were also the individual members, assigned and transferred his interest in the partnership assets to B. his copartner, subject to the firm's debts, with the knowledge that the latter intended to transfer them to a firm and individual creditor, which transfer was made in payment of all the creditor's claims, and where in an action of replevin against a sheriff, who had levied upon the property under an execution in favor of a firm judgment creditor, the evidence as to value of the property transferred was conflicting, there being evidence tending to show, and from which the jury would have been authorized to find, that such value was not more than the claim of the transferee against the firm, and, that the object of S. in transferring his interest, was that the property should be used to pay the firm debt, *held*, the fact that the individual debts were named as part of the consideration, was not conclusive evidence of fraud; that the question of fraud in the transfer was one of fact for the jury; and that, therefore, a direction of a verdict for defendant was error.

Reported below, 53 Hun, 239.

(Argued January 29, 1890; decided February 25, 1890.)

apt APPEAL from order of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 6, 1889, which reversed a judgment in favor of plaintiff entered upon a verdict directed by the court and granted a new trial.

This was an action of replevin.

The goods in question were levied upon by the sheriff under and by the virtue of an execution issued against John Sherlock and John Bulger, the individual members of the firm of Bulger & Sherlock, upon judgments recovered on firm liabilities. Plaintiff claimed title under a bill of sale executed by Bulger.

The further material facts are stated in the opinion.

Nathaniel C. Moak for appellant. The determination of the General Term was erroneous, as matter of law, and should be reversed by this court. (*Sands v. Crooke*, 46 N. Y. 568; *Dickson v. Broadway*, 47 id. 509; *Courtney v. Baker*, 60 id. 7; *Downing v. Kelly*, 48 id. 437, 438; *Harris v. Burdett*, 73 id. 140, 141; *Bronk v. New York*, 95 id. 656; *Pharis v.*

Statement of case.

Gere, 107 id. 233 ; *Wright v. Hunter*, 46 id. 409, 412.) It is the duty of the court to nonsuit the plaintiff, or to direct a verdict in his favor, where it would be the duty of the court to set aside a verdict, as against evidence, if one were found for the plaintiff. (*Dwight v. G. Ins. Co.*, 103 N. Y. 341, 358, 360 ; *Stewart v. Lansing*, 104 U. S. 505, 512 ; *Pleasants v. Fant*, 22 Wall. 116 ; *Bagley v. Bowe*, 105 N. Y. 171, 179.) The question of fraudulent intent must be deemed a question of fact and not one of law. (2 R. S. 137, § 4 ; 2 Edm. Stat. 142 ; *Cunningham v. Freeborn*, 3 Paige, 557 ; *Edgell v. Hart*, 9 N. Y. 213, 218 ; *Reynolds v. Ellis*, 103 id. 124, 125 ; *Ford v. Williams*, 24 id. 364 ; *Davis v. Briggs*, 52 Hun, 614 ; *Coleman v. Burr*, 93 N. Y. 18, 31, 32 ; *Tift v. Barton*, 4 Den. 171, 174, 175 ; *McCarthy v. McDermott*, 10 Daly, 450 ; *Stevens v. Fisher*, 19 Wend. 181, 184, 186 ; *Randall v. Parker*, 3 Sandf. 69, 78 ; *Einstein v. Chapman*, 10 J. & S. 144 ; *Rothschild v. Salomon*, 52 Hun, 486 ; Bump on Fraud. Cont. 24.) Where part of the consideration of a contract of transfer is illegal, the entire transfer is tainted with the illegality and must fall. (1 Whart. on Cont. § 509 ; *Perkins v. Cummings*, 2 Gray, 258 ; *Widor v. Webb*, 20 Ohio St. 431 ; *Foley v. Speir*, 100 N. Y. 552, 557, 558 ; *Saratoga v. King*, 44 id. 87 ; *Pepper v. Haight*, 20 Barb. 429, 437 ; *Irvine v. Stone*, 6 Cush. 508 ; *Chaler v. Beckett*, 7 T. R. 201 ; *Snyder v. Willey*, 33 Mich. 495 ; *Barton v. Port Jackson*, 17 Barb. 397, 406, 407 ; *Rose v. Truax*, 21 id. 361 ; Wait on Fraud. Convey. § 434 ; Bump on Fraud. Con. 364.) The transfer by Sherlock to John Bulger, his partner, and the transfer by John Bulger to the plaintiff, were, on the undisputed facts, legally fraudulent and void as to the firm creditors of Sherlock & Bulger. (Bump on Fraud. Con. 229, 230 ; *Burtus v. Tisdall*, 4 Barb. 571 ; *Anderson v. Maltby*, 2 Ves. Jr. 244 ; *Elliot v. Stevens*, 38 N. H. 311 ; *Ferson v. Monroe*, 21 id. 462 ; *Geortner v. Canajoharie*, 2 Barb. 625 ; *Walsh v. Kelley*, 42 id. 98 ; 27 How. Pr. 359 ; *Wilson v. Robertson*, 21 N. Y. 587 ; 19 How. Pr. 350 ; *Hartley v. White*, 94 Penn. St. 31 ; *Ex parte Mayon*, 4 DeG., J. & S. 664 ; 1 Bates on Part. § 562 ;

825
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Statement of case.

In re Cohn, 26 U. C. C. P. 308; *Kelly v. Scott*, 49 N. Y. 595; *Gorham v. Innis*, 115 id. 87, 92, 93; *Arnold v. Hagerman*, 17 Atl. Rep. 93; *Collier v. Hanna*, Id. 390; *Haston v. Castner*, 31 N. J. Eq. 697; *Hulbert v. Dean*, 2 Keyes, 97; 2 Abb. Ct. App. Dec. 428; *Goodbar v. Cary*, 16 Fed. Rep. 316, 320; 47 Hun, 638; *Ransom v. Van Derenter*, 41 Barb. 307; *Leslie v. Rugg*, 4 Hun, 410; 64 How. Pr. 366; *Menagh v. Whitwell*, 52 N. Y. 146; 49 Hun, 610; *Calkin v. Conner*, 31 Hun, 44; *Heye v. Bolles*, 2 Daly, 231; 33 How. Pr. 266; *In re Cooke*, 3 Biss. 122; *Ferson v. Monroe*, 21 N. H. 462; 82 Ala. 169; *Pratt v. Foote*, 9 N. Y. 463, 468; 10 id. 601; *Beach v. Smith*, 30 id. 131, 132; *Wright v. Van Nostrand*, 21 J. & S. 381; 103 N. Y. 688; *Pattison v. Guardian*, 1 H. & N. 523.) The prevailing opinion of the court below is not well founded. (*French v. Carhart*, 1 N. Y. 102; *Barney v. Worthington*, 37 id. 115.) Plaintiff was not entitled to recover for the few articles purchased between June eighteen and June twenty-one, the time of the levy, with the proceeds of sales of some of the firm property. (*La Comite v. Standard Bank*, 1 C. & E. 87; *Berghoff v. McDonald*, 87 Ind. 550; *Davis v. Marx*, 55 Miss. 376; *Astor v. Miller*, 2 Paige, 68; *Stearns v. Herrick*, 132 Mass. 114; *Nash v. Farrington*, 4 Allen, 157; *Clapp v. Thomas*, 5 id. 158; *Duer v. Kelly*, 68 Ala. 192; *M., etc., Co. v. McLoughlin*, 1 McCrary, 258.) The trial court committed no error in holding, that as the evidence stood there was then no sufficient evidence of any transfer to plaintiff of the property. (*Fisher v. Herone*, 22 Neb. 365; 34 N. W. Rep. 365; *Frey v. Gessley*, 11 Cent. Rep. 655; *U. S. v. Denver, etc.*, 2 R. & C. L. J. 425, 427; 31 Fed. Rep. 886, 890; 1 Whart. on Ev. [3d ed.] § 367; 1 Greenl. on Ev. § 79; 3 Am. Rep. 166, 181; *Edwards v. Lamont*, 47 Hun, 472, 473; 21 N. E. Rep. 415; *Dean v. Anderson*, 34 N. J. Eq. 496; *Moore v. M. Bank*, 55 N. Y. 41, 50; *Fairbanks v. Underwood*, 9 E. Rep. 213, 214; *Stevens v. Brennan*, 79 N. Y. 254; *Mather v. Freelove*, 25 Wkly. Dig. 343; *Weaver v. Barden*, 49 N. Y. 286; *Jewett v. Palmer*, 7 Johns. Ch. 65, 68; Moak's Van Santvoord's Pl. 394, 564; *Gerrit v. Davenport*, 66 Barb.

Opinion of the Court, per ANDREWS, J.

412; 56 N. Y. 676; *Metter v. Gamble*, 4 Barb. 146; *Small v. Smith*, 1 Den. 583; *D. S. M. Co. v. Best*, 105 N. Y. 64; *Seymour v. McKinstry*, 106 N. Y. 230; *N. Bank v. Kidder*, 106 id. 121; *Thompson v. S. N. N. Bank*, 15 N. Y. S. R. 110, 113; *Simpson v. Del Hoyo*, 94 N. Y. 189, 194, 195; *Boone v. Chiles*, 10 Pet. 211; *In re R. I. Co.*, 83 Va. 397; *Weber v. Rothschild*, 15 Oregon, 385.)

Matthew Hale for respondent. The trial court erred in directing a verdict for the defendant and in refusing to submit the questions in the case to the jury. (*Dimond v. Hazard*, 32 N. Y. 65; *Sage v. Chollar*, 21 Barb. 596; *Stanton v. Westover*, 101 N. Y. 265; *Williams v. Whedon*, 109 id. 333; *Crane v. Rosa*, 40 Hun. 455; 2 R. S. 137, § 4; *Campbell v. Woodworth*, 20 N. Y. 499; *Gray v. Walton*, 107 id. 254, 259; *Bagley v. Bowe*, 105 id. 171, 179; 6 N. Y. S. R. 842, 845; *Powers v. Silberstein*, 108 N. Y. 169, 171, 172; *Bent v. Bent*, 19 N. Y. S. R. 30; *Vial v. Mathewson*, 34 Hun. 70; *Griffin v. Cranston*, 1 Bosw. 281; 10 id. 1; *Crook v. Rindskopf*, 105 N. Y. 476, 488; *Bogert v. Haight*, 9 Paige, 297; *Turner v. Jaycox*, 40 N. Y. 470, 475, 476.) If there was any evidence of fraudulent intent in the case, it should have been submitted to the jury. (*Shultz v. Hoagland*, 85 N. Y. 464; 2 R. S. 137, § 4; *Griffin v. Cranston*, 1 Bosw. 281; 10 id. 1; *Vance v. Phillips*, 6 Hill, 433; *Livermore v. Northrup*, 44 N. Y. 107, 110, 111; *Bagley v. Bowe*, 105 id. 254, 259; Id. 179, 180; *Powers v. Silberstein*, 108 id. 169, 171, 172.) The answer is not sufficient to raise any question of fraudulent intent. (*Klinger v. Bondy*, 36 Hun, 601.)

ANDREWS, J. The trial judge directed a verdict for the defendant, and the General Term has granted a new trial on the ground that the question of fraud in the sale from John Bulger to the plaintiff, of the goods, personal property and real estate, which formerly belonged to the firm of Bulger & Sherlock, should have been submitted to the jury. The

Opinion of the Court, per ANDREWS, J.

general rule is well settled, that in a jury case the direction of a verdict is only justified where the evidence conclusively establishes the right of the party in whose favor the direction is given. The test of the right to direct a verdict is whether the court would be bound to set a verdict aside as against evidence, if rendered against the party in whose favor it was directed. If this would be the duty of the court, the judge need not await the verdict before acting, but in advance may rule the question as one of law. But as verdicts cannot be found on mere conjecture, neither will a shadow or possibility, nor a mere scintilla stand in the way of ruling the case in favor of the party who shows a substantial right, of which there is no substantial contradiction. (*Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341; *Bagley v. Bowe*, 105 id. 171.) The statute relating to fraudulent transfers and conveyances, which declares that the question of fraudulent intent arising thereunder shall be deemed a question of fact and not of law (2 R. S. 137, § 4), does not, as now interpreted, interfere with the prerogative of the court to direct a verdict, provided the fraudulent intent is conclusively established on the face of the instrument of transfer, or by the uncontradicted verbal evidence. (*Edgell v. Hart*, 9 N. Y. 213; *Ford v. Williams*, 24 id. 359.) The defendant's counsel has presented a very learned and able argument in support of the view that the uncontradicted evidence established that the transactions resulting in the transfer to the plaintiff of the property of the firm of Bulger & Sherlock were fraudulent as against the firm creditors. The point here is, should this question have been submitted to the jury? The alleged fraud consists, as is claimed, in a scheme between the plaintiff and Bulger and Sherlock, by which Sherlock was to transfer his interest in the firm assets to his copartner John Bulger, so as to enable the latter to transfer them to the plaintiff in payment of debts held by the latter against the firm and also against John Bulger individually. It is undisputed that when these transactions took place both the firm and the individual members were insolvent, and that this was known to all the parties.

Opinion of the Court, per ANDREWS, J.

There can be no controversy as to the rule of law governing the relations between an insolvent firm and its creditors, and their mutual rights in respect of the firm property. The partnership as such has its own property and its own creditors, as distinct from the individual property of its members and their individual creditors. The firm creditors are preferentially entitled to be paid out of the firm assets. Whatever may be the true foundation of the equity, it is now an undisputed element in the security of the firm creditors. The insolvent firm cannot apply the firm assets in payment of the individual debts of the partners, nor can the equity of the firm creditors be defeated by an attempted conversion of the assets of the firm into the individual assets of one of the partners through a transfer by one partner of his interest therein to the other. In either of the cases supposed, they would remain, as to the firm creditors, firm assets, which could be followed and taken on execution by the firm creditors, until they had come to the hands of a *bona fide* purchaser, and where an individual creditor of one of the members of an insolvent firm, knowing of such insolvency, takes a transfer of firm property in payment of his individual debt, his act is not merely a violation of an equitable right of the firm creditors, but it constitutes a fraud under the statute of Elizabeth. The law regards it as a voluntary transfer made to hinder, delay and defraud the firm creditors, and as to them is void. These general principles are established by many cases, but it is sufficient to refer to a few of them. (*Wilson v. Robertson*, 21 N. Y. 587; *Menagh v. Whitwell*, 52 id. 146; *Ex parte Mayon*, 4 DeG., J. & S. 664.)

The case shows that Sherlock, one of the firm of Bulger & Sherlock, on the 15th day of June, 1883, by instruments in writing, assigned, transferred and conveyed to his copartner, John Bulger, all of the firm assets, including the stock in the grocery, book accounts, horse, wagon and harness, and the lot and the store thereon, in which the firm business was conducted, and that on the next day (June sixteenth), John Bulger transferred and assigned the same property to the plaintiff,

Opinion of the Court, per ANDREWS, J.

his brother. The plaintiff, at the time of the transfer to him, held debts against the firm to at least the amount of \$1,750, and the validity of the debt is not disputed. He also held, as assignee of his mother, a debt against John Bulger, individually, of about \$1,100. The value of the firm property transferred by Sherlock to John Bulger, and by the latter to the plaintiff, is the subject of some conflict and uncertainty in the evidence. There is evidence from which the jury would, we think, have been authorized to find that the value, above incumbrances, did not exceed the firm debt owing to the plaintiff. There was evidence given on the part of the defendant which would make the value considerably more. The bill of sale of the personal property from Sherlock to John Bulger states that it is "subject to the payment in full of all claims of every name and nature now in existence against said firm of Sherlock & Bulger, which said claims and demands the said John Bulger does hereby agree and assume to pay." The bill of sale from John Bulger to the plaintiff was not produced, it having been burned in the burning of the store about two years after the transaction, with other papers of John Bulger. The plaintiff was examined as to the consideration of the transfer to him by John Bulger of the firm property, and he testified in substance that it was the cancellation of his debt against the firm and the surrender of John Bulger's individual notes of \$1,100, given to his mother.

It is insisted that the transfer by Sherlock to John Bulger of his interest in the firm property, was itself fraudulent, first, because it was an attempt to change the character of the property from firm property to the individual property of John Bulger; and, second, because it was a part of the scheme to pay John Bulger's individual debt to the plaintiff out of the firm assets. Both of these claims may perhaps be true, but the alleged fraudulent intent on the part of Sherlock is not an inference of law from the evidence, although a jury might be justified in finding the fact. The bill of sale executed by Sherlock does not show on its face an intent to divert the property

Opinion of the Court, per ANDREWS, J.

from the firm creditors. The transfer is expressly made subject to the firm debts, thereby preserving, instead of defeating the rights of the firm creditors. There is no doubt upon the extrinsic facts proved that Sherlock understood that John Bulger would immediately transfer the property to the plaintiff. The defendant's counsel insists that he knew it was to be turned out to pay his individual debt as well as the firm debt. The defendant's counsel on the trial pressed John Bulger to state the object of Sherlock, and the witness testified: "Well the principal object was owing to the fact that I had accused him on several different occasions as acting as though he wished to see Jerry (plaintiff) lose the money that he had invested; so finally he said he would sell out the whole concern to me, in order that I might pay Jerry. He stated further that he was satisfied, and wanted to pay Jerry, as he knew Jerry had loaned his hard-earned money." The jury might have found from this that Sherlock's object in transferring the property was, that it should be used to pay the firm debt to the plaintiff, and not the individual debt of John Bulger. It was for the jury to interpret the transaction in the light of all the circumstances. The subsequent transaction between John Bulger and the plaintiff, if it necessarily implies a transfer by the former to the latter of the firm property to pay John Bulger's individual debt, the transfer would be void. If, however, the jury might have believed that the firm debt held by the plaintiff was equal to, or substantially equal to, the value of the property transferred, and that the individual claims against John Bulger, held by the plaintiff, were given up as an inducement to John Bulger to pay the firm debt by a transfer of the property, the mere fact that the individual claims were named as a part of the consideration, would not, I think, be conclusive evidence of fraud, or necessarily subvert a transaction which, except for that incident, might be found to be valid. The firm, although insolvent, had a right to make preference among its creditors, and one partner may transfer the partnership effects directly to a creditor of the firm in payment of a debt without the knowledge or consent of his copartner. (*Mabbett v. White*,

Statement of case.

12 N. Y. 442.) The case upon the evidence is far from being a clear one for the plaintiff. But there is but little, if any, ground to charge him with designed fraud or moral turpitude. His debt is not disputed. The personal property on the sale by the defendant brought but \$945. The facts did not, we think, conclusively establish a case from which fraud is imputed in law, and we concur in the opinion of the General Term that the verdict was erroneously directed.

The order should be affirmed and judgment absolute ordered for the plaintiff on the stipulation.

All concur.

Order affirmed and judgment accordingly.

OWEN DONNEGAN, Appellant, v. JOEL B. ERHARDT, as Receiver,
etc., Respondent.

A railroad corporation, for the safety of its passengers as well as its employes, is bound to use suitable care and skill in furnishing not only adequate engines and cars, but also a safe and proper track and road-bed. The track must be properly laid, the road-bed properly constructed, and reasonable prudence and care exercised in keeping the track free from obstructions, animate and inanimate, and if, from want of proper care, such obstructions are permitted to be, or to come upon the track, and a train is thereby wrecked, the corporation is responsible for injuries received by any person thereon, whether passenger or employe.

In an action to recover damages for injuries received by plaintiff, who was a brakeman in the employ of defendant, it appeared that the injuries were caused by a collision in the night-time between the train upon which plaintiff was employed and a horse which plaintiff claimed came upon the track through defendant's negligence in permitting the fence along its road to become out of repair. The case was submitted to the jury, with instructions that if the horse came upon the track through a fence which defendant was bound to maintain and keep in repair, and which was negligently permitted to be out of repair, plaintiff could recover. *Held*, no error.

Langlois v. B. & R. R. Co. (19 Barb. 364), so far as it holds otherwise, overruled.

Statement of case.

Under the provision of the General Railroad Act (§ 44, chap. 140, Laws of 1850), requiring railroad corporations to build and keep in repair fences on the sides of their roads, and providing that they "shall be liable for damages which shall be done * * * to any cattle, horses, sheep or hogs thereon," an absolute duty is imposed upon said corporations to fence their tracks, not simply to protect the lives of animals, but also to protect persons upon their trains, and for violation of said statutory duty, causing injury, such a corporation is liable.

It seems that, independent of the statute, a jury may find that it is the duty of a railroad company to fence its track to guard against such dangers.

Donnegan v. Erhardt (23 J. & S. 502), reversed.

(Argued January 30, 1890 ; decided February 25, 1890.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made the first Monday of March, 1888, which reversed a judgment in favor of plaintiff entered upon a verdict, and ordered a new trial.

The nature of the action and the material facts are stated in the opinion.

Hector M. Hitchings for appellant. The order granting the new trial in this action is appealable and this court will review the decision of the General Term with the same thoroughness as if the appeal were from a judgment. (Code, §§ 190, 191, 1318 ; Baylies on N. T. & App. 145, 232 ; *Pharis v. Gere*, 112 N. Y. 411 ; *Williams v. W. U. T. Co.*, 93 id. 162 ; *Scott v. Morgan*, 94 id. 508, 514 ; *Clude v. Emmerich*, 26 Hun, 10 ; *Tomlinson v. Mayor, etc.*, 44 N. Y. 601 ; *People v. Boas*, 92 id. 563 ; *Harris v. Burdett*, 73 id. 136.) The statute compelling railroad companies to erect and maintain fences and cattle-guards was passed for the benefit of the traveling public as well as farmers contiguous thereto, and is not limited in its scope and effect by the penalty set out therein. (*Corwin v. N. Y. & E. R. R. Co.*, 13 N. Y. 42, 47 ; *Shephard v. B. & E. R. R. Co.*, 35 id. 641 ; *Brown v. N. Y. C. R. R. Co.*, 34 id. 404 ; *Staats v. H. R. R. R. Co.*, 3 Keyes, 196, 201 ; *Purdy v. N. Y. & N. H. R. R. Co.*, 61 id. 353 ; *Graham v. D., L.*

Statement of case.

& W. R. R. Co., 46 Hun, 386 ; Boone on Corp. § 253 ; *Suydam v. Moore*, 8 Barb. 258 ; *Waldron v. R. & S. R. R. Co.*, Id. 390.) This statute being remedial, is not to be construed strictly against passengers, employes or farmers, but should receive a liberal construction to effectuate the benign purposes of its framers, and a strict construction only against the railroad company that fails to comply with its requirements. (*Tracy v. T. & B. R. R. Co.*, 38 N. Y. 433, 437 ; *Brace v. N. Y. C. & H. R. R. R. Co.*, 27 id. 269, 272 ; *Burchfield v. N. C. R. Co.*, 57 Barb. 589.) The statute imposes upon railroad companies the duty not only to erect proper fences of the height and strength of division fences, but also to maintain and keep the same in perfect repair. (*Staats v. H. R. R. R. Co.*, 3 Keyes, 196 ; *Spinner v. N. Y. C. R. R. Co.*, 6 Hun, 600 ; Boone on Corp. § 253.) The General Term are in error in the proposition that as, before the statute, the law had not made it incumbent upon the railroad company to fence, after the statute, the only actions upon it are those described in the statute. (*Durkin v. Sharp*, 88 N. Y. 225 ; *Pantzar v. T. F. I. M. Co.*, 99 id. 368 ; *Kain v. Smith*, 89 id. 375 ; *O'Donnell v. A. R. R. Co.*, 59 Penn. St. 239 ; *Snow v. H. R. R. Co.*, 8 Allen, 441 ; *Ryan v. Fowler*, 24 N. Y. 410 ; *Hawley v. N. C. R. R. Co.*, 82 id. 370 ; *Holbrook v. U. & S. R. R. Co.*, 12 id. 236 ; *Breen v. N. Y. C. & H. R. R. R. Co.*, 109 id. 300 ; *Jetter v. N. Y. & H. R. R. Co.*, 2 Keyes, 154 ; *Seybolt v. N. Y. L. E. & W. R. R. Co.*, 95 N. Y. 562 ; *Willey v. Mullely*, 78 id. 314 ; *Graham v. D. & H. C. Co.*, 46 Hun, 386 ; *Massoth v. D. & H. C. Co.*, 64 N. Y. 531 ; *Beiseigel v. N. Y. C. R. R. Co.*, 14 Abb. [N. S.] 29 ; *Knupfle v. K. I. Co.*, 84 N. Y. 491 ; *Thomas v. U. R. R. Co.*, 97 id. 248 ; *Brown v. N. Y. C. R. R. Co.*, 34 id. 404 ; *Jones v. Seligman*, 81 id. 190.) Although an employe at the time of entering the service of a railroad company must be deemed to assume the ordinary risks incident to the service, the employer cannot avail himself of this assent unless he has taken reasonable precautions to insure the employe's safety while in the performance of the duties assigned him. The principle, therefore, has no application

Statement of case.

where the injury is traced to the employer's personal failure to take such precautions, nor where he knew of the existence of such a danger of which the servant has no means of knowledge. (*Durkin v. Lambert*, 88 N. Y. 225; *Dana v. N. Y. C. & H. R. R. R. Co.*, 92 id. 639; *Slater v. Jewett*, 85 id. 61; *Pantzar v. T. F. M. Co.*, 99 id. 368, 372; *Stringham v. Stewart*, 100 id. 516, 526; *Benzing v. Steinway*, 101 id. 547, 552; *B., O. & C. R. R. Co., v. Rowan*, 1 West. Rep. 916.) The failure to fence and build proper cattle-guards was the proximate cause of the injury complained of. (*Lilly v. N. Y. C. & H. R. R. R. Co.*, 107 N. Y. 566, 574; S. & R. on Neg. 8, § 10; *Harvey v. N. Y. C. & H. R. R. R. Co.*, 19 Hun, 560; *L. & N. R. R. Co. v. Jones*, 3 R. & C. L. Jour. 495; *Brehm v. G. W. R. R. Co.*, 34 Barb. 264, 276; *Flike's Case*, 53 N. Y. 549; *Brown v. N. Y. C. R. R. Co.*, 34 id. 404.) There was no negligence on the part of a co-employee that exempts the defendant from liability. (*Deering on Neg.* 202; *Conlin v. S. F. & R. R. Co.*, 36 Cal. 404; *McKyring v. Bull*, 16 N. Y. 297; *O'Mara v. T. R. R. Co.* 38 id. 448; *Durkin v. Sharp*, 88 id. 225; *Lansing v. N. Y. C. R. R. Co.*, 49 id. 521, 532; *Mann v. Prest., etc.*, 91 id. 495, 500; *Pantzar v. T. F. M. Co.*, 99 id. 371, 372; *Stringham v. Stewart*, 100 id. 526; *Benzing v. Steinway*, 101 id. 547; *Loughlin v. State*, 105 id. 162; *Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 id. 546; *Fuller v. Jewett*, 80 id. 546; *Cone v. D. L. & W. R. R. Co.*, 81 id. 206, 209.)

Sherman Evarts for respondent. At common law there was no duty imposed upon a railroad company to fence the sides of its tracks or use any means for keeping cattle from its property, and the plaintiff would have no right against the company for such failure. (*Corwin v. R. R. Co.*, 13 N. Y. 42; *Springer v. R. R. Co.*, 67 id. 153; *Munger v. R. R. Co.*, 4 id. 349; *Langlois v. B., etc., R. R. Co.*, 19 Barb. 364.) The statute does not impose a general liability for failure to fence. (*Munger v. R. R. Co.*, 4 N. Y. 349; Laws of 1854, chap. 282, § 7; *Stevens v. Jeacock*, 11 Q. B. 731; *Stafford v.*

Opinion of the Court, per EARL, J.

Ingersoll, 3 Hill, 41; *Olney v. Harris*, 5 Johns. 175; *Conch v. Steel*, 3 Ed. & B. 402; *Atkinson v. N., etc., Co.*, L. R. [2 Exch. Div.] 441; *Knight v. R. R. Co.*, 99 N. Y. 25.) Under the authorities bearing upon the point to be considered in this case, the court must exclude a general liability in civil actions under the act. (*Langlois v. B. & R. R. Co.*, 19 Barb. 364; *Knight v. N. Y., etc., R. R. Co.*, 99 N. Y. 25; *Moore v. Gadsden*, 93 id. 12; *Atkinson v. W. W. Co.*, L. R. [2 Exch. Div.] 441.)

EARL, J. While the plaintiff, in 1887, was in the employ of the defendant as a brakeman upon a train of cars in the night-time, the train came in collision with a horse upon the railroad track, and was thereby wrecked, and he was seriously injured. He brought this action to recover damages for his injuries, claiming that the horse got upon the railroad track because the defendant had carelessly and negligently permitted the fence along the railroad to become ruinous, broken down and out of repair; and that it had, therefore, violated the duty imposed upon it by section 44 of the General Railroad Act of 1850 (Chap. 140), which requires every railroad company to build and maintain fences on the sides of its road of the height and strength of division fences; and that so long as such fences and cattle-guards shall not be made, and when not in good repair, such railroad corporation and its agents shall be liable for damages which shall be done by the agents or engines of any such corporation to any cattle, horses, sheep or hogs thereon.

The claim of the defendant was that, at common law, independently of the statute, the railroad company would not have been liable for the accident which happened to the plaintiff, and that the statute specified the extent of the liability imposed upon a railroad corporation for its omission to build or maintain fences, and that thus it was liable only for damages done to animals coming upon the railroad track through a defective fence. The trial judge, however, submitted the case to the jury, and instructed them that if this horse came upon the

railroad through a fence which the defendant was bound to maintain and keep in repair, and which was negligently permitted to be out of repair, the plaintiff could recover, and the jury rendered a verdict in his favor. From the judgment entered upon the verdict, the defendant appealed to the General Term, and there the judgment was reversed upon the ground that the only responsibility of a railroad company for defective fences is that mentioned in the statute, and that at common law, independently of the statute, a railroad company would not have been liable to the plaintiff for the injuries sustained by him.

We think the learned General Term fell into error. A railroad company, for the safety of its passengers as well as its employes upon its engines and cars, is bound to use suitable care and skill in furnishing, not only adequate engines and cars, but also a safe and proper track and road-bed. The track must be properly laid and the road-bed properly constructed, and reasonable prudence and care must be exercised in keeping the track free from obstructions, animate and inanimate; and if, from want of proper care, such obstructions are permitted to be or come upon the track, and a train is thereby wrecked, and any person thereon is injured, the railroad company, upon plain common-law principles, must be held responsible. Experience shows that animals may stray upon a railroad track, and that if they do there is danger that a train may come in collision with them and be wrecked. Adequate measures, reasonable in their nature, must be taken to guard against such danger. Independently of any statutory requirement, a jury might find, upon the facts of a case, that it was the duty of a railroad company to fence its tracks to guard against such danger.

But whatever the rule would be independently of the statute, there is no reasonable doubt that it imposes the absolute duty upon a railroad company to fence its tracks. That duty, it is reasonable to suppose, was imposed not only to protect the lives of animals but also to protect human beings upon railroad trains. It is made an unqualified duty, and for a violation

Opinion of the Court, per EARL, J.

thereof causing injury the railroad company incurs responsibility. The sole consequence of an omission of the statutory duty is not specified, and was not intended to be specified in the statute. Responsibility for injuries to animals was specially imposed, because in most cases there would, independently of the statute, have been no such responsibility, as at common law the owner of animals was bound to restrain them, and if they trespassed upon a railroad there was no liability for their destruction, unless it was wilfully or intentionally caused.

We are, therefore, of opinion that the railroad company was responsible to the plaintiff for the injuries received without any fault on his part, and for this conclusion there is much authority in judicial utterances to be found in the books. (*Corwin v. N. Y. & E. R. R. Co.*, 13 N. Y. 42; *Jetter v. N. Y. & H. R. R. Co.*, 2 Keyes, 162; *Staats v. H. R. R. Co.*, 3 id. 196; *Brown v. N. Y. C. R. R. Co.*, 34 N. Y. 404; *Shepard v. B. N. Y. & E. R. R. Co.*, 35 id. 641; *Purdy v. N. Y. & N. H. R. R. Co.*, 61 id. 353; *Jones v. Seligman*, 81 id. 190; *Graham v. D. & H. C. Co.*, 46 Hun, 386.)

The case of *Langlois v. Buffalo & Rochester Railroad Company* (19 Barb. 364), so far as it holds a different doctrine, does not meet with our approval.

The order of the General Term should, therefore, be reversed and the judgment entered upon the verdict affirmed, with costs.

All concur.

Order reversed and judgment affirmed.

Statement of case.

THE NEW YORK LUMBER AND WOOD WORKING COMPANY,
Appellant, v. MORRIS SCHNIEDER et al., Respondents.

119	475
167	322

In an action to foreclose a mechanic's lien the defendant pleaded an arbitration and award. The particular claims actually submitted were not included in the record; it simply appeared they were claims growing out of a contract by which the plaintiff was to perform certain work and furnish certain materials in the erection of houses for defendants. The agreement of submission stated it embraced "all questions and disputes arising and to arise under said contract, including all claims of either party for damages for non-performance, delay or otherwise." The award recited that the arbitrators had "heard the proofs and allegations of the parties," and found that plaintiff, under the contract and in addition thereto, had performed work to an amount specified, and after crediting payments and deducting a sum for damages sustained from failure to complete the work within the time specified, allowed and awarded the plaintiff \$919.10. *Held*, that the award was conclusive as to all causes of action subsisting between the parties, springing out of their contractual relation; that it was incumbent upon plaintiff to show, if it desired to avoid its conclusiveness, that there were matters in difference presented which the arbitrators declined or neglected to decide; also, *held*, that the court properly refused to allow a recovery for the amount awarded.

The submission to arbitration by parties, of all matters in dispute, growing out of a particular transaction or contract, will estop them from thereafter claiming that the award is not conclusive and does not embrace a decision upon some particular matters.

A submission of disputes to arbitrators, governed by common-law principles and rules, may be competently made, notwithstanding the provisions of the Code of Civil Procedure on that subject; and the provision therein (§ 2383) making a submission irrevocable by either party, after their allegations and proofs have closed and the matter has been finally submitted, applies to such a submission.

An award is a complete bar to the maintenance of any action upon the original right or cause; for it the award is substituted, which is a new right, with corresponding obligations.

It appeared that when the arbitrators had made their award the parties were notified, but delivery was withheld until payment of the fees and expenses. No time for the delivery of the award was fixed by the submission. The case showed that the arbitrators were requested to make frequent inspections of the work in progress and to give directions about it. *Held*, that the authority to award against one or both of the parties the costs of the arbitration was incident to the general submission, and the arbitrators had a right to hold the award as security for the payment of

Statement of case.

their charges in the absence of a condition in the agreement of submission to the contrary.

In legal contemplation an award takes effect when ready for delivery and the parties have been notified to that effect.

(Argued January 31, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Court of Common Pleas of the city and county of New York, entered upon an order made June 4, 1888, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

Everett P. Wheeler for appellant. The award is void, because the arbitrators did not pass upon all the questions submitted to them. (*Wright v. Wright*, 5 Cow. 199; *Moore v. Cockroft*, 4 Duer, 133; *Jones v. Wellwood*, 71 N. Y. 208; *Merritt v. Thompson*, 27 id. 230; 6 Wait's Pr. 529; *Morse on Arbitration*, 342; *In re Rider*, 3 Bing. 874.) It is also void because the award in terms only discharges the claim of the lumber company against the Schnieders under the contract. (*Moore v. Cockroft*, 4 Duer, 139; *Stoddard v. Whiting*, 46 N. Y. 627; *Wright v. Wright*, 5 Cow. 199.) The award was not delivered, and is, therefore, void. (*Block v. Palgrave*, 2 Cro. Eliz. 797; *Parker v. Parker*, Id. 448; *Buck v. Wadsworth*, 1 Hill, 321; *Redman on Awards*, 143; *Pratt v. Hackett*, 6 Johns. 14.) The commencement of this suit was a revocation of the arbitration. (*Peters v. Craig*, 6 Dana, 307; *Harus v. Hiscock*, 91 N. Y. 342.) The award should be set aside because the arbitrators were not competent, disinterested and impartial. (*Livermore v. Bainbridge*, 14 Abb. [N. S.] 227; *Redman on Awards*, 90-93, 129, 130.) The award should be set aside because of unfairness and partiality on the part of the arbitrators. (*Perkins v. Giles*, 30 N. Y. 232; *Redman on Awards*, 199.) The award should be set aside because the award directed the lumber company to pay \$1,449, the entire fees and expenses of the arbitrators. (*Akely v.*

Statement of case.

Akely, 17 How. Pr. 24.) The award is no bar to this action. (*Moore v. Cockroft*, 4 Duer, 139; *Chambovet v. Cagney*, 3 J. & S. 474; *Ryder v. Jenney*, 2 Robt. 69.) Even if the award be sustained, the plaintiff should have had judgment in its favor for the foreclosure of the lien for the amount of the award with interest. (*Arthur v. H. F. Ins. Co.*, 78 N. Y. 462; Code Civ. Pro. § 1207; *Bate v. Graham*, 11 N. Y. 237; *Purdy v. Huntington*, 42 id. 334, 346; *Wilson v. Troup*, 2 Cow. 195, 231; *Bostwick v. Frankfield*, 74 id. 207; *James v. Morey*, 2 Cow. 246, 284.)

William Man for respondents. The plaintiff claims that, the award not having been delivered until after suit brought, the arbitration was revoked by the commencement of an action. (Code Civ. Pro. § 2383; 2 R. S. 544, § 23.) The claims submitted are not shown by the written claims filed before the arbitrators. It is not competent to show what took place before the arbitrators unless for the purpose of showing corruption and misconduct. (*Perkins v. Wing*, 10 John. 146; *Todd v. Barlow*, 2 Johns. Ch. 551; *Perkins v. Giles*, 63 Barb. 346; Morse on Arbitration, 348.) If the award is valid, it is a bar in this or any action except one based upon the award to enforce the relief awarded by it to the plaintiff. This action is not of such nature, but, on the contrary, is brought subsequently as a suit for foreclosure of a mechanic's lien under the statute. (*Wiberley v. Matthews*, 91 N. Y. 648; *Coleman v. Wade*, 6 id. 44; *Ressequie v. Brownson*, 4 Barb. 545; *Armstrong v. Masten*, 11 Johns. 189; *Wheeler v. Van Houten*, 12 id. 310.) Payment of the award need not be pleaded. (*Armstrong v. Masten*, 11 Johns. 189; *Brazill v. Isham*, 12 N. Y. 9.) The arbitrators have the right to fix their fees and to refuse to deliver the award until they are paid. (*Ott v. Schroepel*, 3 Barb. 56; *Clement v. Comstock*, 2 Mich. 359; 6 Wait's Act. & Def. 523; *People v. Newell*, 13 Barb. 86; *Nichols v. R. C. Mut. Ins. Co.*, 22 Wend. 127; *Strong v. Ferguson*, 14 Johns. 161; *Doke v. James*, 4 N. Y. 575.) When the parties have selected arbitrators as their

Opinion of the Court, per GRAY, J.

tribunal, and have had their trial which has resulted in an award, they are to be held bound by it, and their only remedy is on the award. (*Brazill v. Isham*, 12 N. Y. 9; *Perkins v. Giles*, 63 Barb. 346; *Doke v. James*, 4 N. Y. 575.) The parties, by the submission, agreed to submit all questions and disputes arising and to arise under the contract, etc. This was valid and competent. The mere fact that disputes might thereafter arise which were included does not make it void. It was perfectly competent to submit such matters. (*People v. Newell*, 13 Barb. 86; *Haggart v. Morgan*, 5 N. Y. 422; *D. & H. C. Co. v. Pa. Coal Co.*, 50 id. 250.) A submission to arbitration even discontinues a pending action for the same cause. (*Camp v. Root*, 18 Johns. 22; *Ex parte Wright*, 6 Cow. 339; *Town v. Wilcox*, 12 Wend. 503; *Coleman v. Wade*, 2 Seld. 44, 49; *McNulty v. Solley*, 95 N. Y. 242.)

GRAY, J. This action was brought to foreclose a mechanic's lien, filed by the plaintiff to secure a claim made by it against the defendants. The defendants interposed the plea of an arbitrament and award, and upon the trial that plea was held to be good, and the complaint was dismissed. The court refused, also, to allow the plaintiff to recover the amount awarded in the arbitration proceedings. The legal questions arising were carefully and well considered at the General Term, where the judgment was affirmed. I consider the case to have been rightly disposed of below, and, in considering this appeal, I shall review only generally some points which the appellant's counsel has strenuously insisted upon before us.

The submission by the parties of their disputes to the judgment of arbitrators, it is conceded, was governed by common-law principles and rules. Such submissions may be competently made, notwithstanding the existence of Code provisions for arbitrations. (Code Civ. Pro. § 2386.) Section 2383 of the Code applies equally to them and makes them irrevocable by either party, after their allegations and proofs have been made and the matter has been finally submitted to the arbitrators. We so held recently in *People ex rel. v. Nash* (111

N. Y. 310), and it was there decided that when a submission has reached that stage, it has passed beyond the power of the parties to withdraw from, or to break it.

If the award, which is relied upon by the defendant in defense of this action, is unaffected and not avoided by anything appearing in the record before us, it was a complete bar to the maintenance of any action upon the original right or cause. For the original cause of action, as the result of arbitration, there was substituted this award, which is a new right with corresponding obligations. The original right and cause of action arising out of the contract disappeared, or, rather, merged in this award. This result is a necessity, not only from the convention of the parties in the matter, but from the demands of the policy of the law. After parties have been heard before such a tribunal of their own choosing, upon the matters in difference between them, litigation is at an end on that head. Any other rule would be intolerable.

In *Coleman v. Wade* (6 N. Y. 44), it was decided that submission suspends the original right of action, and that when an award is made before suit, the mode to make it available is by plea in abatement. In that case, the cause of action was in assumpsit against defendants as guarantors of the performance by a lessee of his covenants in the lease. A submission to arbitration by the lessor and lessee, as to rent due and concerning all claims and damages, being proved upon the trial, the plaintiff was nonsuited. It was said: "There is no doubt that if a suit had been commenced on this lease by lessor against lessee, a plea in bar of this arbitrament and award would have been good."

In *Wiberly v. Matthews* (91 N. Y. 648), it was held that after submission and award, between a contractor for the erection of a building and the owner, as to a controversy over extra and omitted work, the claim of the contractor was merged in the award, and that award was a bar to the maintenance of an action on the original claim.

But it was argued for the appellant that the award here is not binding, because the arbitrators did not pass upon all the questions submitted to them. We can only judge as to the scope

Opinion of the Court, per GRAY, J.

of the submission and of the decision, in the arbitration proceedings, from the agreement and award itself, together with some evidence on the subject admitted upon the trial of this action.

The particular claims actually submitted to the arbitrators by the parties are not exhibited in the record. They grew out of a contract, by which the plaintiff was to perform certain work and to furnish certain materials upon and to defendants' houses. But I doubt if their particularization in this action would affect the question, in any material aspect of it.

The agreement of submission was general and included "all questions and disputes arising and to arise under said contract, including all claims of either party for damages for non-performance, delay or otherwise." The award recited that the arbitrators had "heard the proofs and allegations of the parties." It then found that the plaintiff, under the contract, and in addition, had performed the work, etc., of the value of \$7,644.50; that from failure in completing its work within the time specified by the contract, the defendants had been damaged to the extent of \$3,225.40; that the plaintiff had received on account the sum of \$3,500, and after deducting the amount of the damages sustained from the amount found due, they allowed and awarded to the plaintiff the sum of \$919.10.

The award was as general as was the submission, and every reasonable intendment must be made to sustain it. I find nothing whatever in the case impeaching the award, and it was incumbent upon the plaintiff to show, if it desired to avoid its conclusiveness, that there were any matters in difference presented to the arbitrators, which they declined, or neglected, to decide. The language of their award is comprehensive enough of the general controversy, and I think it was conclusive on the parties as to all causes of action subsisting between them and springing out of their contractual relations. No rule of law forbade their making an agreement to abide by the decision of selected arbitrators, as to claims, which at the time had grown out of the original contract, and as to those which might grow out of it during the continuance of the work upon which the plaintiff had engaged.

Opinion of the Court, per GRAY, J.

In the absence of some positive proof of neglect or refusal by the arbitrators to decide any of the particular matters presented under the submission, the presumption holds good that their award covers all of the submission. (*Ott v. Schroepel*, 5 N. Y. 482.) The parties, certainly, were bound, under their general submission, to claim before the arbitrators all the demands coming within the scope of the submission and, in this case, the absence of negative proof forbids our disregarding the legal presumption that every such demand was laid before them.

I think a party is bound, by the very spirit and letter of a general submission, to submit every demand he has arising out of the transaction, or contract, and, if he fails to do so, he should not be heard to complain, in the face of a general award, that there were matters omitted to be passed upon. I think the rule should be a settled one that the submission by parties of all matters in dispute, growing out of a particular transaction, or contract, will estop them from thereafter claiming that the award is not conclusive, if its language and terms, when fairly regarded, are comprehensive. The presumption should be strongly upheld by the courts that the arbitrator's decision was a final adjustment of all matters in controversy.

These propositions find their support in well considered cases in the reports; such as the early English and American cases of *Smith v. Johnson* (15 East. 215); *Dunn v. Murray* (9 B. & C. 780); *Wheeler v. Van Houten* (12 Johns. 313); *Ott v. Schroepel* (5 N. Y. 482) and *Brazill v. Isham* (12 id. 9). In *Smith v. Johnson*, Lord ELLENBOROUGH decided that when all matters were referred, the parties ought to bring forward every demand which was within the scope of the reference. In *Dunn v. Murray*, where all matters in difference, in a suit brought to recover wages for work actually done and damages for a tortious dismissal from service, were referred to arbitration, the report was held by Chief Justice TYNDAL, on the strength of that decision of Lord ELLENBOROUGH, to be a bar to a subsequent action for the dismissal only; although no claim was made for it before the arbitrators, and their award was confined to the value of the

Opinion of the Court, per GRAY, J.

work. These, and the New York cases cited, carry out the principle that the estoppel upon the parties is co-extensive with the submission, and the parties, where the submission is of all matters, will not be allowed to defeat the award by showing that a general award does not embrace a decision upon some particular matter or demand.

The only other points I think important to notice, upon this appeal, are those relating to the delivery of the award and to the direction as to the payment of the fees and expenses of the arbitrators. When they had made their award, the parties were notified; but delivery was withheld until payment of the fees and expenses. By the submission no time was fixed for the delivery of the award and, from the case, it appears that the arbitrators were requested to make frequent inspections of the work in progress and to give directions about it. Their duties, under the terms of the submission, related to questions and disputes which should arise thereafter, as well as to those which had already arisen. The authority to award against parties the cost of the arbitration was an incident of the authority contained in the general submission of their disputes. (*Cox v. Jagger*, 2 Cow. 638; *Strang v. Ferguson*, 14 Johns. 161.) Such an authority necessarily follows from the employment of the arbitrators, and it involves, where the submission is a general one, the right to impose the fees and expenses in the proceeding upon one, or both parties. The agreement of employment gave them the legal right to recover them and, necessarily, to decide as to who should pay them. In legal contemplation, the award takes effect, when ready for delivery and the parties have been notified to that effect. That the arbitrators may hold it as security for the payment of their charges, etc., unless the agreement stipulates to the contrary, does not at all affect the force or effect of their award. (*Ott v. Schroepel*, 3 Barb. 56.)

I think the judgment appealed from should be affirmed with costs.

All concur.

Judgment affirmed.

Statement of case.

SEBASTIAN SHORER, Appellant, v. THE TIMES PRINTING AND PUBLISHING COMPANY, Impleaded, etc., Respondent.

The provision of the Code of Civil Procedure (§ 1778), declaring that, in an action against a corporation "to recover damages for the non-payment of a promissory note, or other evidence of debt for the absolute payment of money upon demand, or at a particular time, * * * unless the defendant serves with a copy of his answer or demurrer, a copy of an order of a judge directing that the issues presented by the pleadings be tried, the plaintiff may take judgment, as in case of default in pleading at the expiration of twenty days," does not apply to an action wherein it is sought to charge a corporation as indorser of a promissory note; it is to be confined strictly to actions upon instruments which admit on their face an existing debt payable absolutely.

Reported below, 53 Hun, 88.

(Submitted February 24, 1890; decided March 4, 1890.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department made the first Tuesday of June, 1889, which reversed an order denying a motion to vacate a judgment in favor of plaintiff taken by default.

The nature of the action and the material facts are stated in the opinion.

Fanning & Williams for appellant. The action was against a domestic corporation to recover damages for the non-payment of a promissory note, and was clearly within the provisions of section 1778 of the Code of Civil Procedure; and the failure of the defendant corporation to serve with its answer an order of a judge directing that the issues be tried, entitled the plaintiff to take judgment against it by default. (Edmonds on Bills & Notes [3d ed.], 288, § 405; 2 Parsons on Notes & Bills, 23, § 6; Daniel on Neg. Inst. §§ 666-671; *Studley v. C. O. Ins. Co.*, 19 Hun, 127; Throop's Code, § 1778; Laws of 1825, chap. 325, § 4; 1 R. S. 458, § 8; 3 R. S. [6th ed.] 741, § 6; 2 R. S. 428, §§ 8, 9; *Moran v. Long Island City*, 101 N. Y. 441; *Hutson v. M. S. Co.*, 12 Abb. [N. C.] 279; *Beaumont v. D. Co.*, 5 Civ. Pro. Rep. 274; *Schlegal v. A. B. B. & A. B. Co.*, 64 How. Pr. 196; *Barr Co. v. Kuntz Co.*,

Opinion of the Court, per O'BRIEN, J.

18 Abb. [N. C.] 476; Code Civ. Pro. [Bliss] § 525; *N. Y. L. Ins. Co. v. U. L. Ins. Co.*, 88 N. Y. 424-429; *Edington v. M. L. Ins. Co.*, 67 id. 194.)

D. C. Feeley for respondent. Section 1778 of the Code refers only to promissory notes, or other evidences of debt, for the absolute payment of money, when such notes or evidences of debt are made or issued by a corporation. (Story on Prom. Notes, § 135; Chitty on Bills, § 241; Story on Bills, §§ 224, 225; Edwards on Bills, Notes & Neg. Inst. § 384; *N. Y. L. Ins. Co. v. U. L. Ins. Co.*, 88 N. Y. 426; *Tyler v. A. F. Ins. Co.*, 2 Wend. 280, 428.) Section 1778 is in derogation of the common law, and must be strictly construed, so where plaintiff, in an action against a corporation, united in the same complaint a cause of action upon a promissory note and another for goods sold and delivered, he waived the benefit of said section. (*Bradley v. A. F. Co.*, 2 Code Civ. Pro. 50; *Beaumont v. D. Co.*, 5 id. 276; *Hutson v. M. S. Co.*, 12 Abb. [N. C.] 278; *Schlegel v. A. B. & Co.*, 64 How. Pr. 196; *McKee v. M. L. Ins. Co.*, 25 Hun, 583; *Brace v. K. & Co.*, 18 Abb. [N. C.] 476.)

O'BRIEN, J. The plaintiff's action was on a promissory note made by one Merrill to the order of and indorsed by the corporation defendant, and upon which it was claimed that the liability of the defendant had become fixed by demand and notice. The defendant, within the twenty days, served an answer to the complaint which the plaintiff disregarded, and entered judgment as in case of default. The defendant then made a motion in the court where the action was brought to vacate the judgment, which was denied, and the General Term has reversed this order and granted the motion.

The plaintiff claims that the answer was a nullity inasmuch as the order prescribed by section 1778 of the Code of Civil Procedure was not procured and served with it, and if that section has any application to an action of this kind his contention is correct. The language of the section referred to, so far as material to the question raised by this appeal, is as follows:

Opinion of the Court, per O'BRIEN, J.

“In an action against a foreign or domestic corporation, to recover damages for the non-payment of a promissory note, or other evidence of debt, for the absolute payment of money, upon demand, or at a particular time, * * * unless the defendant serves, with a copy of his answer or demurrer, a copy of an order of a judge directing that the issues presented by the pleadings be tried, the plaintiff may take judgment, as in case of default in pleading, at the expiration of twenty days.”

We think that this provision has no application to an answer served by a corporation in a suit brought against it as indorser. This court has held that “it is to be confined strictly to actions upon instruments which admit on their face an existing debt payable absolutely,” and that it had no application to an answer served by an insurance company in a suit upon a life insurance policy, though the policy had become due by the death of the insured. (*N. Y. L. Ins. Co. v. U. L. Ins. Co.*, 88 N. Y. 424.)

The defendant's contract of indorsement upon which the action is brought is not one “for the absolute payment of money upon demand or at a particular time.” The defendant by its indorsement undertook to pay the note to the holder only in case that when due it was duly presented to the maker for payment, and payment demanded and refused by him, and then notice given of this refusal to the indorser. Its agreement to pay was essentially conditional in its character. This statute, in a proper case, permits a plaintiff to disregard the sworn answer of the defendant and to proceed to judgment as if no answer had been served. There is no good reason for extending it to cases not within its terms. The defendant was not subject to its provisions in this case, and, therefore, the judgment entered against it was without authority. (*N. Y. L. Ins. Co. v. U. Ins. Co.*, *supra*; *Moran v. Long Island City*, 101 N. Y. 439; *Anonymous*, 6 Cow. 41; *Tyler v. Ætna Fire Ins. Co.*, 2 Wend. 280.)

The order appealed from should be affirmed

All concur.

Order affirmed.

Statement of case.

HENRY J. BURCHELL v. SUSANNAH OSBORNE et al.

119	486
129	489

In an action to foreclose a second mortgage upon certain lots in the city of New York, the first mortgagee was made a party, and payment of the first mortgage was adjudged to be made out of the proceeds of the sale. Other persons who held subsequent mortgages covering, in whole or in part, said lots, which took effect at different dates, were made parties to the action. The decree of sale provided for a sale of the lots in separate parcels in the inverse order of the giving of the mortgages. A surplus having arisen on sale of all the lots, the court below directed a distribution, according to the priorities as liens of the various subsequent mortgages. *Held*, no error; that the decree did not and could not settle the priorities and equities of the subsequent incumbrances; that the whole proceeds of sale formed a common fund, to be applied first to the payment of the first and second mortgages, the surplus to the payment of the subsequent liens in the order of their priority, subject to the limitation that no greater amount should be paid in discharge of a lien on any lot than was realized for the lot at the sale; that, therefore, the surplus could not be regarded as constituting a specific fund, subject to the specific liens upon the last lot sold, but as a common fund distributable to all the lienors in the order of the date when their mortgages became liens.

(Argued January 24, 1890 ; decided March 4, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 4, 1889, which reversed an order of Special Term confirming the report of a referee in surplus money proceedings.

The nature of the appeal and the material facts are stated in the opinion.

Lilian Herbert Andrews for appellants. Where land is sold under a judgment and the surplus moneys are brought into court, creditors having liens upon the land, subsequent to the judgment, have the same liens upon the surplus moneys which they had upon the land previous to the sale. (*Averill v. Loucks*, 6 Barb. 470; *Purdy v. Doyle*, 1 Paige, 558.)

Hal Bell for appellant Arbogast. The view taken by the General Term is erroneous, because the decree directing the

Statement of case.

sale and the manner in which the eight lots, and houses thereon should be sold, fixed the rights of the parties and is conclusive upon them. (*Stuyvesant v. Hall*, 2 Barb. Ch. 151; *McCracken v. Valentine*, 9 N. Y. 42-45; *Vandercook v. C. S. Inst.* 5 Hun, 641; *Price v. Larve*, 49 Tex. 74; *Miller v. Sharp*, 49 Cal. 236; *Adams v. Cameron*, 40 Mich. 506; *Delafield v. White*, 19 Abb. [N. C.] 104; Thomas on Mort. [2d ed.] 1887, §§ 957, 965; *Charter v. Stevens*, 3 Den. 33; *Bridgen v. Carhartt*, 1 Hopk. Ch. 234; *Averill v. Loucks*, 6 Barb. 470; *Lithaner v. Royle*, 17 N. J. Eq. 40.) The defendant and respondent Currier not having appealed from the Special Term order to the General Term was in no legal position and had no right to be benefited by the decision or order of the General Term. (Code Civ. Pro. § 1294; *Murphy v. Spaulding*, 46 N. Y. 556.)

Henry Arden for respondents. Where the debtor has conveyed or mortgaged a portion of the mortgaged premises, retaining the rest, the grantee or mortgagee can insist that the portion remaining in the mortgagor's hands be first sold and the proceeds applied to the payment of the debt. (*Stevens v. Cooper*, 1 Johns. Ch. 430.) The rule has its foundation in the equitable principle that where a creditor has two funds for the security of his debt, and another creditor has an interest in only one of said funds, without right to resort to the other, equity will compel the first creditor to take his satisfaction out of the fund in which the second creditor has no interest, before resorting to the other fund. (*Ingalls v. Morgan*, 10 N. Y. 178.) The rule controls where different parcels of the mortgaged premises are incumbered with separate mortgages. (*N. Y. L. Ins. Co. v. Vanderbilt*, 12 Abb. Pr. 458; *Oppenheimer v. Walker*, 3 Hun, 30; *Savings Bank v. Wood*, 17 id. 133; *Steere v. Childs*, 15 Hun, 511.) A mortgage, for the purpose of determining equities between the respective owners of parcels of land, subject to incumbrance upon all, is to be regarded as an alienation *pro tanto*, at the time of its date. (*Hart v. Wandle*, 50 N. Y. 386.) A subse-

Statement of case.

quent mortgage upon a part of the equity of redemption, by the owner of the whole of the mortgaged premises, is only an alienation of that part to the extent of the money due on such junior mortgage, and for which the owner of such junior mortgage has no other security which should in equity be first resorted to. If a part of the mortgaged premises has been mortgaged a second time, and the residue thereof has been sold absolutely, subsequent to the second mortgage, the part mortgaged should be first sold and the surplus proceeds of that sale, beyond the amount of principal and interest due on the second mortgage should be applied in payment of the first mortgage before resorting to a residue of the premises for that purpose, which was conveyed absolutely. (*Kellogg v. Rand*, 11 Paige, 50.) The right of the junior incumbrancer cannot be disturbed. (*Gill v. Lyon*, 1 Johns. Ch. 447; *Clowes v. Dickerson*, 5 id. 235; 9 Cow. 403; *James v. Hubbard*, 1 Paige, 228; *Gouverneur v. Lynch*, 2 id. 300; *Jenkins v. Freyer*, 4 id. 47; *Guion v. Knapp*, 6 id. 35; *Skeel v. Spraker*, 8 id. 182; *Patty v. Pease*, 8 id. 277; *Schryver v. Teller*, 9 id. 173; *Kellogg v. Rand*, 11 id. 59; *N. Y. L. I. & T. Co. v. Cutler*, 3 Sandf. Ch. 176; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Ferguson v. Kimball*, 3 id. 616; *L. Co. v. Bell*, 22 Barb. 54; *Hopkins v. Wolly*, 81 N. Y. 84.) The direction as to the order of sale in the decree did not affect the rights of the junior lienors to the surplus, and was not intended to. It cannot affect the equities of the lienors as between themselves; and where the whole premises are sold, it makes no difference in what order the parcels are sold. The proceeds will go into court as a common fund, and the junior liens paid in the order of their priority. (*Snyder v. Stafford*, 11 Paige, 78; *Oppenheimer v. Walker*, 3 Hun, 33.) So jealous is the court in protecting the rights of the junior lienors that it will order the sale of more lots than sufficient to pay judgment, even after the sale, under the decree, of sufficient to pay same, if the interest of the junior lienors demand it. (*Livingston v. Mildrum*, 19 N. Y. 442.) Where a defendant has paid more than

Opinion of the Court, per GRAY, J.

his proportion of a prior lien, he will be deemed subrogated to the plaintiff's rights, and awarded satisfaction out of the surplus. (*Cheesbrough v. Millard*, 1 Johns. Ch. 412.) The rights of the junior incumbrancers in the order of their priority, according to the principles above stated, will always be enforced in a court of equity, and are recognized as a rule of property, in the courts of the United States. (*Orvis v. Powell*, 98 U. S. 176; *Thomas v. M. M. Co.*, 43 Hun, 487.) These principles of distribution have been recognized and followed in recent cases in the Court of Appeals. (*O. N. Bank v. Moore*, 112 N. Y. 543; *Andrews v. O'Mahoney*, Id. 567.)

Wm. B. Putney for respondent Currier. The several mortgagees should participate in the said surplus in the order of their respective priorities, as to the times when their said several mortgages were made. (*Ingalls v. Morgan*, 10 N. Y. 178; *James v. Hubbard*, 1 Paige, 228; *Gouverneur v. Lynch*, 2 id. 300; *Guion v. Knapp*, 6 id. 35; *Schreyver v. Teller*, 9 id. 173; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Lafarge Co. v. Bell*, 22 Barb. 54; *Barnes v. Mott*, 64 N. Y. 397, 402.) The entire plot having had to be sold, any surplus that arose, arose not solely from the sale of lot No. 8, but is to be regarded as the surplus arising from the sale of the entire plot, and constituting a common fund for the benefit of all lienors upon the entire plot or parcels thereof, without regard to the specific liens on lot No. 8. (Thomas on Mort. §§ 964, 965; *Snyder v. Stafford*, 11 Paige, 71; *Van Slyke v. Van Loan*, 26 Hun, 344, 347.) There is no destruction of the effect of the recording acts as to notice by reason of the application of the surplus to the payment of the several mortgages in the order of their respective priorities. (*Stuyvesant v. Hall*, 2 Barb. Ch. 151.)

GRAY, J. The appellants are interested in the disposition of some surplus moneys, arising upon a sale under a decree in foreclosure in this action.

Opinion of the Court, per GRAY, J.

The question is, whether the General Term, in reversing an order for distribution made at Special Term, and in directing distribution according to the priorities of the various junior mortgages in point of date as liens, have violated those equitable principles by which these matters are guided to the justest result. I am inclined to hold that the opinion of the General Term states correctly the general rule for the determination of the equities of junior incumbrancers in such cases. The mortgage foreclosed covered all of eight lots of land in the city of New York, and was second to another mortgage, of like extent of lien. The first mortgagee was made a party to this action and payment of the first mortgage debt was adjudged to be made from the proceeds of the foreclosure sale. After satisfying the terms of the decree, the surplus in question remained. The appellants and the respondents, with other parties, held mortgages affecting in whole, or in part, these eight lots; which were subsequent to the mortgage foreclosed and which were made and took effect at different dates.

The decree of sale provided for a sale in separate parcels, in the inverse order of their alienation; that is to say, of the giving of mortgages upon them. The reason of this direction was, that by such a sale more might be realized than by sale in block; and upon this mode of sale the junior incumbrancers had insisted. They were parties to the action, and such a provision, we may assume, was for their general benefit and protection. The General Term decided that the principle upon which the equities of the parties ought to be determined was, that the portions of the mortgaged premises first aliened should be the last to be sold to pay the mortgage debt. They held that the effect of alienation of lands by mortgage is to postpone the application of the property covered to the payment of the general mortgage debt, only to the extent of the amount secured by the junior mortgage.

It was supposed, at the Special Term, that the decree, in directing this sale in the inverse order of alienation, by separate parcels, had settled the relative rights and equities of the parties; but I think the learned justice fell into error in this assumption.

Opinion of the Court, per GRAY, J.

The whole premises were liable for the debts of the first and second mortgages, and, if the sale should be by separate parcels, that would be because the court was satisfied that in so ordering the rights of parties would be better protected. The decree did not and could not settle any question as to the relative priorities and equities of the subsequent incumbrancers. To warrant such a clause in the decree, it would have been necessary to have raised some issue in the pleadings and proceedings prior to decree, upon which the judgment of the court might be passed. When a surplus arises upon a foreclosure sale, the question may then come before the court as to the several and relative rights of subsequent lienors to share in its distribution, and that can be competently determined upon equitable principles in a special proceeding, as in this case. The learned justice at Special Term also thought that such a sale by separate parcels wiped out the specific mortgage debts upon each particular lot, as it was sold towards the satisfaction of the decree. This would, however, be a violation of equitable principles. Each lot covered by the several mortgages foreclosed was liable in equity to contribute to the payment of the debt represented thereby and, in the case supposed by the learned justice at Special Term, of the sale stopping short at the seventh lot, because of a sufficient realization at that point, the eighth lot would not have remained *solely* liable to the specific liens of the junior mortgages covering it. The equity in that remaining lot would have been subject to the claims of other incumbrancers of the lands sold, which were prior in point of time. As such an order of sale was for the very benefit of the junior incumbrancers, who were made parties to the action, equity would not tolerate that their relative rights and equities should be so interfered with, as to permit so great an injustice and such an inequality of rights to be worked out. And, rather than that should result, a sale of the remaining lot would have been directed, that its proceeds might be disposed of as equity might require.

Now here the sale of the last lot produced the surplus for distribution. The whole proceeds of sale formed a common fund,

Opinion of the Court, per GRAY, J.

to be applied, first to the payment of the first and second mortgage debts, and then the surplus became, obviously, as it seems to my mind, subject to the claims of lienors upon the lands which had been sold, and applicable to those claims in the order of their priority; subject, of course, to the limitation that no greater amount should be paid in discharge of the lien on any lot than was realized for the lot at the sale. It is clear enough, that in such a sale, by separate parcels instead of in block, each parcel, as it went to discharge the general mortgage, contributed to relieve the last lot from that lien. If, therefore, through the sale, a surplus arose, it cannot be regarded as constituting a specific fund, subject to the specific liens upon the last lot, but, under equitable rules in the marshalling of the debtor's assets, as a common fund distributable to all of the lienors upon the lands sold, in the order of the dates when their mortgages became liens upon the debtors' property. The lien of each junior incumbrancer, which had been affixed to the land sold to discharge the general lien of the mortgage foreclosed, would, it seems to me, equitably attach to the fund resulting from the sale of the lands, in the order in which the lien had been originally created. Upon such a sale as this, when a surplus arises as the final result, the liens would, in equity, be transferred from the land sold to the ultimate fund arising, and, naturally, in the order of their priority as such.

I think, for the reasons stated in the General Term opinion, as well as for those here briefly given, the order of the General Term was right and should be affirmed with costs.

All concur.

Order affirmed.

Statement of case.

THE PEOPLE ex rel. HOGAN, Appellant v. STEPHEN B. FRENCH
et al., as Police Commissioners of the City of New York,
Respondents.

119	493
119	505
119	506
119	508
119	493
123	637

The relator, a member of the police force of the city of New York, was dismissed therefrom upon a charge of "conduct unbecoming an officer;" the specification was, that at a named date and place, he was so much under the influence of liquor as to be unfit for duty. It appeared that the relator had served on the police force fifteen years, during which time his record had been in every way excellent and he had drunk no intoxicating liquor. On the occasion in question he had been on duty during a strike of street-car drivers, who resisted the running of the cars. For five days he was continuously employed in guarding the cars and repelling attacks upon them. On the morning of the fifth day, which was severely cold, he was ordered out without opportunity to get his breakfast and detailed to guard moving cars; he rode upon the front platforms of such cars until the middle of the afternoon, when he became faint and ill. Upon reporting his illness to the sergeant, the latter took him off the cars and advised him to report sick, but the relator persisted in remaining on duty. Later he took one drink of brandy and peppermint to relieve his illness and the surgeon who saw him at eight o'clock testified that his breath smelled slightly of liquor; that he could walk steadily, and talk coherently, his speech being a little thick; that in his opinion he had been drinking, but was not then intoxicated. The relator was on these facts dismissed from the force. *Held* (RUGER, Ch. J. and GRAY, J. dissenting), that the dismissal was error; that the evidence failed to show any breach of discipline by the relator, or conduct unbecoming an officer; and that, therefore, as the facts admitted of no inference of guilt, of conscious breach of discipline or violation of rule, the case presented a question of law reviewable by the General Term on certiorari, and also reviewable here. *People ex rel. v. French* (110 N. Y. 494) distinguished.

(Argued February 24, 1890; decided March 11, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, entered upon an order made July 9, 1889, which affirmed the decision of defendant, as the board of police commissioners of the city of New York, in proceeding against the relator, a member of the police force, by which decision he was discharged from the force.

The nature of the charge against the relator and the material facts are stated in the opinion.

Opinion of the Court, per FINCH, J.

John M. Tierney for appellant. This court has power to review the judgment of the General Term in the case at bar. (Code Civ. Pro. § 2140; *Russell v. Conn.*, 20 N. Y. 81; *Tracy v. Altmeyer*, 46 id. 598; *Footte v. People*, 59 id. 321; *People ex rel. v. Comrs.*, 106 id. 64; *People ex rel. v. Comrs.*, Id. 653; *People ex rel. v. Fire Comrs.*, 96 id. 672; *People ex rel. v. Fire Comrs.*, 100 id. 82.) The court below erred in finding that it had no power to redress the wrong inflicted upon the relator, after finding that there was no evidence contained in the record, which in the slightest degree justified it. (*People v. Comrs.*, 52 How. Pr. 289; Code Civ. Pro. §§ 2137, 2138, 2140; *People v. Comrs.*, 106 N. Y. 64.) The relator having reported sick to his commanding officer, as required by rule 121 of the police department, had a right to be relieved from duty, and not having been so relieved, was justified in using such remedial agents as were necessary to help him. (Laws of 1882, chap. 410, § 250.)

D. J. Dean for respondents. The requisites of jurisdiction existed and the proceedings were regular. (Laws of 1882, chap. 410, § 272; *People ex rel. v. Bd. of Police*, 99 N. Y. 676.) The judgment of the board of police is sought to be reversed upon the ground of its alleged injustice to relator, but as there is sufficient evidence to sustain the determination this court cannot interfere. (*People ex rel. v. Fire Comrs.*, 32 N. Y. 358; *People ex rel. v. Fire Comrs.*, 96 id. 644; *People ex rel. v. Bd. of Police*, 93 id. 79, 101; *People ex rel. v. French*, 110 id. 494.) The truth and adequacy of the excuse offered by the relator in palliation of his intoxication, are for the board of police to pass upon, and its judgment is conclusive. (*People ex rel. v. French*, 102 N. Y. 724; *People ex rel. v. French*, 110 id. 494.)

FINCH, J. I am unable to resist the conviction that, upon the record returned to us in this case, the charge against the relator was wholly and essentially unproved, and that he was guilty of no offense whatever. The charge was "conduct

Opinion of the Court, per FINCH, J.

unbecoming an officer," and the specification that at a named date and place he was so much under the influence of liquor as to be unfit for duty. The facts established were that he had been upon the force for upwards of fifteen years, and that during all that period his record had been a very excellent one, the sergeant under whose command he had served saying, upon the hearing, and expressing the greatest pleasure in making the declaration, that he was a first-class officer. For fifteen years he had drank no intoxicating liquor, so that there was about him no taint of evil habit to suggest a possible yielding to temptation. If the fact be deemed somewhat remarkable, it is significant that nothing to the contrary was found in the record of his service, and the sergeant, who must have known him thoroughly and well, vouched for his truthfulness by saying that he thought his statements were correct in every particular. The relator was on duty during the railroad strike in the early days of the year of 1889, when nearly all the street-cars in the city were abandoned by their drivers, and their movement resisted. For five days he had been continuously employed in guarding the cars and repelling angry and dangerous attacks upon them. On the morning of the fifth day, which was severely cold, he was ordered to the Sixth Avenue Railroad station without opportunity to get his breakfast, and was detailed to guard the moving cars, upon the front platforms of which he rode up and down until the middle of the afternoon, when he became faint and ill. He reported his sickness to Sergeant Norton, who says he took him off the cars and advised him to report sick, but relator said that in view of the trouble he thought it would be mean to do so, and persisted in staying on duty. Later he took one drink of brandy and peppermint to relieve his illness, and, not being accustomed to it, some degree of intoxication followed. The surgeon saw him at eight o'clock and says "his breath smelled slightly of liquor; he could walk steadily and talk coherently; his speech was a little thick; I was of the opinion that he had been drinking; he was not intoxicated at the time." The sergeant says he reported sick after the strike was over. On

Opinion of the Court, per FINCH, J.

this state of facts he was dismissed from the force, and the question raised is whether they furnished any evidence of breach of discipline or violation of the rules of the department.

The General Term, with undisguised reluctance, affirmed the order upon the authority of our decision in *People ex rel. v. French* (110 N. Y. 494). I think that they misunderstood its scope and meaning, and viewed it as establishing a rigid and arbitrary rule which left the action of the police commissioners practically without restraint. To that decision we shall steadily adhere. Its conclusion we do not desire to change, and its doctrine, which we then approved, seems to us still entirely correct and sound. That doctrine was that where there was any evidence of the offense charged, or the facts admitted of any inference of guilt, we should follow the conclusion of the commissioners in view of their peculiar responsibilities and their larger opportunities of arriving accurately at the truth. Upon the facts in that case an inference of guilt, of a breach of discipline and conscious and voluntary violation of the rules, was not only possible, but entirely natural and just. The proof showed that the officer was so badly intoxicated, so utterly under the influence of liquor, as to throw grave doubt upon his statement that his condition was due to the single drink of brandy and ginger given him by a third person, and to indicate that the sickness of which he then complained was a pretense to hide an existing intoxication. Conscious of the lameness of that explanation, the relator in that case claimed that he had previously taken two doses of bromide of potassium and ammonia, but evidence was given showing that the consequent medicinal effect would not explain, or help to explain, the condition of gross and palpable intoxication which existed. On such a state of facts the excuse of sickness and of brandy taken as a medicine — always suspicious and doubtful unless under the clearest and strongest proof — became little more than a pretense. The inference of guilt was at least a possible one, and we declined to interfere with it. And so, in this case, if a similar inference is at all possible, if a reasonable man can reasonably infer a conscious

Opinion of the Court, per FINCH, J.

breach of discipline or violation of rule from any or all the facts, then we must hold the conviction to have been justified; but if such an inference is not possible, if there is no shadow of justification for it, the case presents a pure question of law, a judgment rendered without any evidence to support it, which always requires at our hands a reversal.

Let us recur then to the facts. An officer who had served on the force for fifteen years, with a record and reputation every way excellent, who, during that long period had never once drank intoxicating liquor and whose truthfulness his commanding officer does not hesitate to affirm, is engaged, for five days, in a struggle with strikers who are striving, often with violence, to prevent the running of the street-cars. On the morning of the fifth day, through the severe cold of the winter and without opportunity for breakfast, he is sent to his difficult and perilous work. Between the hours of three and four o'clock in the afternoon he becomes faint and ill. Exhaustion and cold and lack of customary food produce their natural result. He complains of illness to his sergeant. The latter, who has seen and watched him, feels no doubt of the fact and takes him off the cars and advises him to report sick. That meant an abandonment of the relator's duty in an hour of great peril. He declines to do so. He determines to continue on duty and stand up to his work, in spite of weakness and suffering. At 4.20 in the afternoon he is perfectly sober, but soon after he takes one drink of brandy and peppermint and it overcomes him. At 5.30 he appears to be and is somewhat under the influence of liquor and is taken to the station-house. At eight o'clock, when examined by the surgeon, he is not intoxicated. Summing it all up, it comes to this: An officer on duty when the service is necessary and perilous, takes brandy and peppermint in a single instance, as a medicine to palliate suffering and enable him to continue in the performance of his duty. Unfortunately it produces a temporary intoxication and fails as a remedy. Is that intoxication a breach of discipline and a violation of the rules? Clearly it is not, if that is the truth about it. Can anybody say, with a

Opinion of the Court, per FINCH, J.

grain of justice in saying so, that this was "conduct unbecoming an officer?" That was the charge formally presented, and it requires us to consider the nature and quality of his act, the purpose and aim of what he did, the character of his conduct. That conduct was not unbecoming an officer. What he consciously did, what he meant to do, what he tried to accomplish and thought he could, was to brace his exhaustion and weakness with a temporary stimulant so as to enable him to continue in the performance of his duty. He took it only and solely as a medicine and for its useful effect. If there was the least ground for doubting that, I should vote for his removal. Unfortunately he misjudged. Consequences came which he did not anticipate and the reverse of what he expected, and, while his conduct was right, he is punished for such unexpected consequences. It is said that he pleaded guilty. That is not true in any just or reasonable sense. He did admit that while on duty he was under the influence of liquor. That is all he admitted, and he did so in connection with other facts which amounted, not to a plea of guilty, but to an assertion of innocence. And so the charge against him was wholly unproved. There was not the least evidence to sustain it. If I could see in his past habits, in his official record, in the circumstances detailed or surrounding his alleged offense, the slightest ground for an inference that he was not really and truly ill, that he took the brandy as a drink and not as a medicinal stimulus, that he sought his own pleasure and not strength to perform his duty, that he acted recklessly and without reasonable motive, I should be prompt to uphold the decision of the commissioners. Almost invariably sickness is made the excuse for intoxication. It is right to suspect it, to challenge it severely, to reject it almost uniformly. But when, beyond any question or doubt, it is the truth, and the dose of brandy has been resorted to in a sudden emergency, from a commendable motive, and with a reasonable expectation that it will sustain the failing ability to perform duty, there is no breach of discipline, there is no conduct unbecoming an officer, and it does not become such because a

Dissenting opinion, per GRAY, J.

partial intoxication supervenes which no one could reasonably have anticipated. These views lead to a reversal of the order.

The order of the General Term and of the commissioners should be reversed, with costs in this court and the Supreme Court.

GRAY, J. (dissenting). I must express my dissent from the views which lead my associates to a reversal of this order.

The facts in the record seem to furnish a strong appeal to the sympathies in behalf of the appellant, and to indicate that his was an extremely severe punishment; but, with the degree of the punishment and the exculpatory circumstances of the appellant's case, the appellate tribunal has no power to deal. The police commissioners might well have considered the good record of the accused, and the mitigating circumstances under which his offense occurred. But this case is indistinguishable from that of *People ex rel. v. French* (110 N. Y. 494), where we unanimously agreed upon the rule of law in such cases. The rule was salutary and sound and, in my opinion, to reverse the order in this case is to introduce an inconsistency in our rulings, which will impair the force and good effect of that rule.

As a record, the *Masterson Case* was even less strong than this for the application of the rule. There the accused pleaded not guilty. Here the offense charged was that the officer was so much under the influence of liquor as to be unfit for duty. Upon the trial the intoxication was admitted by the accused and was independently proved. The trial before the commissioners was conducted with an evident bias in favor of the officer, from his previous record. He was told to plead to the charge one way or the other, and then said, "it is true." The sergeant said there was no doubt in his mind that the accused was under the influence of liquor, and the roundsman testified to the same thing. Under rule 193 of the police force "any member of the police force may be punished by the board of police, in their discretion, * * * by dismissal from the force on conviction of * * * intoxication * * *." That punishment the board decided to, and did, impose.

It is impossible to say that there was not evidence here, upon

Dissenting opinion, per GRAY, J.

which the commissioners acted. It is said that the plea of the accused may be disregarded as an admission, and that the evidence does not amount to proof of conduct unbecoming an officer ; but, certainly, with, or without, his plea, it was testified that he was under the influence of liquor ; which is the precise offense which the rule specifies as warranting the commissioners to exercise their discretion, in the imposition of the punishments prescribed. It does seem to me that we cannot rearrange and weigh and explain away evidence to relieve against what we may deem an unmerited sentence, without arrogating to ourselves new functions and powers as a tribunal. This court should not review the determination of the court below, except when the record presents some question of law. No such question arises here. The evidence is not even conflicting as to the officer's having been affected by liquor. It only raised a fair question as to whether the conceded and proved offender should be dealt with severely.

In the *Masterson Case*, the accused officer attempted to escape the consequences of the proof of his intoxication, by showing that his physical ailment was the cause of taking the liquor. RUGER, Ch. J., delivered the opinion of the court, in which we all concurred, and said: "Whether under special circumstances a particular officer is excusable for having voluntarily rendered himself unfit for duty, or violated police regulations, depends so much upon the personal knowledge and experience of the commissioners and the consideration by them of individual character, the general moral condition and discipline of the force, and other facts peculiarly within their knowledge, that an attempted review of their action by an appellate tribunal would proceed in a great measure in ignorance of the facts upon which it was predicated. * * *

We are, therefore, of the opinion that this question was exclusively for the consideration of the commissioners, and that the appellate court had no authority to review the exercise of their discretion on the subject." And before that, this court had held, in *People ex rel. v. Fire Commissioners* (82 N. Y. 358), that "we are not to inquire into the merits of the decision,

Dissenting opinion, per GRAY, J.

or the justness of the penalty imposed. We can only look far enough to see that some violation of duty, some incompetency, or negligence, was charged against the relator and evidence given tending to establish its existence.”

There was no doubt here about the fact of intoxication. The only doubt which exists is, whether, under the attendant circumstances, the penalty mentioned in the rule ought to have been inflicted. But what has the appellate tribunal to do with that? The rule was one which was within the power of the police board to enact. (*People ex rel. v. Police Comrs.*, 99 N. Y. 676.)

It was the law of the case and conferred a discretionary power upon the board with respect to the punishment of a convicted offender. The commissioners had before them the accused and the proofs. They knew of the circumstances surrounding his act, but they also knew the officer, and still they decided to impose the extreme punishment. We cannot say there was no evidence to authorize their judgment of conviction; only, that the excuse might have had some weight with them. But, as we held in the *Masterson Case*, the matter of the excuse was one exclusively for the consideration of the commissioners.

I think we should adhere to our previous ruling, and that a reversal of this order will tend to introduce a confusion of authority, which will promote doubt and dissatisfaction in the force, respecting the determination of their governing body, to the detriment of its efficiency. To reverse, in the face of the former ruling, is to invite appeals to this court in every case where a member of the force of a department of a municipal corporation is disciplined, and to subject the determination, upon questions of fact and discretion, to the judgment of this court.

I think every consideration of policy and the importance to the community that there shall be a uniform rule, with respect to the review of these cases in the appellate court, consistently adhered to, demand that the order appealed from should be affirmed.

All concur with FINCH, J., except RUGER, Ch. J., and GRAY, J., dissenting.

Order reversed.

Statement of case.

119	502
123	637
119	502
142	354
119	502
f168	489
168	492
119	502
78	AD 434

THE PEOPLE ex rel. PATRICK McALEER, Appellant, v. STEPHEN B. FRENCH et al., Police Commissioners of New York City, Respondents.

The relator, a member of the police force of the city of New York, was dismissed from the force for intoxication. It appeared, that on October fifteenth, he was on duty until five o'clock in the afternoon, when he went home, and after moving his furniture to another house, again went on duty, and during the night came home, settled his house and went to bed. He went on duty at eight o'clock the next morning, and just before that hour, not having had any breakfast, his wife procured some brandy, which, as she alleged, fearing he would be sick, she insisted upon his drinking. After doing so, he went upon duty, and while at his post, between twelve and one o'clock, his wife, still fearing he would be sick, took him more brandy which he drank. About half past one, he went to the station-house, fell down on the floor and was found there intoxicated. It did not appear that he had been advised by any physician to take the brandy for any ailment, or that he had any physical ailment, except he testified that he was sometimes dizzy-headed. It appeared that the relator had been on the force many years and had always before been a sober and faithful officer. *Held*, that the evidence was sufficient to sustain the charge and to authorize the inference that the intoxication was voluntary and blamable; that the fact that relator's wife advised him to drink the brandy did not relieve him from responsibility; and that the exercise of discretion by the commissioners, as to the extent of the punishment, was not reviewable here.

The members of the police force of the city of New York have a permanent tenure of office and cannot be dismissed until after charges have been preferred, examined, heard and investigated, as provided by the statutes and the rules adopted by the board of police commissioners.

It seems, that before a police officer can be dismissed from the force for intoxication, it must be shown that the intoxication was of such a character as made it an offense against the rules; *i. e.*, that it was conscious, voluntary, blamable, and in some way due to the officer's fault.

In the absence of any proof or explanation, the mere fact of intoxication may establish the offense.

It seems, also, that in determining the guilt of a police officer, the police commissioners may not act upon their own knowledge, the charges must be tried and the guilt established on evidence; but in inflicting punishment, they may take into consideration both the evidence and their knowledge of the officer.

It seems, also, that under the provision of the Code of Civil Procedure (§ 2140) in regard to the questions to be determined upon the hearing on

Statement of case.

the return of a certiorari, where that writ is issued to review the determination of the police commissioners, the Supreme Court may inquire not only whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination, but it must look into the evidence, and if it finds that there is a preponderance of evidence against the determination of the commissioners, it has the same jurisdiction to reverse the determination it now has to set aside the verdict of a jury as against the weight of evidence.

People ex rel. Hogan v. French (ante, p. 493), distinguished.

(Argued February 24, 1890; decided March 11, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department made July 9, 1889, which affirmed an order of the police commissioners of the city of New York dismissing the relator from the police force.

The nature of the proceeding and the material facts are stated in the opinion.

Edward T. Wood for appellant. The discretion lodged in the board of police to remove an officer from the force, can only be exercised in a fair and reasonable way upon a hearing of all the facts. (Laws of 1882, chap. 410, § 272.)

D. J. Dean for respondents. The charge, signed by the sergeant commanding and by the surgeon, was in compliance with the rules of the department, and even if not, the objection, not having been taken at the trial, was waived. (*People ex rel. v. Police Comrs.*, 93 N. Y. 98.) The court below was right in affirming the determination of the police commissioners upon the merits. (*People ex rel. v. French*, 110 N. Y. 494.) It being discretionary with the commissioner presiding at the hearing to postpone such hearing until an opportunity has been afforded to the relator to call additional witnesses, the exercise of that discretion adversely to the relator cannot be interfered with by the court, and will not justify a reversal of the respondent's determination. (*Leggett v. Boyd*, 5 Wend. 376; *Anthony v. Smith*, 5 Bosw. 509; *S. M. Co. v. Wiggin*, 14 N. H. 441; 40 Am. Dec. 203; *Taylor v. Commonwealth*, 77 Va. 695.) The requisites of jurisdiction existed;

Opinion of the Court, per EARL, J.

the procedure of the respondents was regular; the punishment inflicted was authorized by law, and the court cannot interfere with the exercise of the commissioners' discretion as to the amount of punishment imposed. (Laws of 1884, chap. 180; Laws of 1882, chap. 410, §§ 250, 272; *People ex rel. v. Fire Comrs.*, 100 N. Y. 83.)

EARL, J. The members of the police force of the city of New York have a permanent tenure of office, and they cannot be dismissed from the force for any fault or misconduct until after charges have been preferred against them and such charges have been examined, heard and investigated, as provided in the statutes and the rules adopted by the board of police commissioners. The following is one of the rules adopted by that board: "Any member of the police force may be punished by the board of police, in their discretion, either by reprimand, forfeiture and withholding pay, not exceeding thirty days for any one offense, or by dismissal from the force on conviction of either of the following offenses, to-wit." Among the offenses specified are intoxication, neglect of duty and conduct unbecoming an officer.

We are dealing in this case with the offense of intoxication, as that was the charge made against the relator. Before a police officer can be dismissed from the force for intoxication, it must be shown that the intoxication was of such a character as to be an offense against the rules; that it was conscious, voluntary, blamable and in some way due to his fault. In the absence of any other proof, or of any explanation, the mere fact of intoxication might establish the offense, because it would have to be assumed that the officer voluntarily brought himself into that condition. But if it should appear that the officer was by force compelled to drink intoxicating liquor; or that he had taken it when it was so disguised that he did not know its character, or in good faith when it was prescribed by a physician for some bodily ailment, and that thus he became intoxicated, no blame would attach to him, he would be guilty of no offense and would in no way be in fault; and then he

Opinion of the Court, per EARL, J.

could not be convicted or dismissed from the force on account of such intoxication. In *People ex rel. Masterson v. French* (110 N. Y. 494), we held that upon the undisputed evidence the relator was guilty of the intoxication charged, that it was voluntary, and that he was in fault, and to blame for it, that the extent of the punishment for it rested in the discretion of the police commissioners, and that the Supreme Court had no jurisdiction to interfere with their determination as to that. We, therefore, reversed the decision of the Supreme Court in this court and affirmed that of the commissioners. In the recent case of *People ex rel. Hogan v. French*, we held upon the undisputed facts that the intoxication was occasioned under such circumstances as to show that the relator was in no sense blamable therefor, that he had committed no offense and was not in fault and could not, therefore, properly be convicted and dismissed from the force. And, thus, while those cases are, in a certain sense, analogous, they are not alike, and are plainly distinguishable upon the grounds stated in the opinion of FINCH, J., in the latter case.

Here we think there was sufficient evidence to authorize the police commissioners to find that the relator was guilty of the intoxication charged, in the sense that it was voluntary, and that he was in fault and to blame for it. It appears that on the thirteenth day of October, after being on duty until five o'clock P. M., he went home and then moved his household goods from the house where he was then living into an adjoining house, and that afterward he again went on duty and came home in the night and settled his house and went to bed. It does not appear at what hour he got up the next morning. But he was to go on duty at eight o'clock, and just before that, not having had any breakfast, his wife went to the corner grocery and got some brandy in a tumbler and brought it to him, and, fearing he would become sick, insisted upon his drinking it, which he did. He then went upon duty, and while at his post, between twelve and one o'clock, she being still afraid he would become sick, took some more brandy to him, which he then drank, and about half after one he went

Opinion of the Court, per EARL, J.

to the station-house and fell down on the floor, and was found there intoxicated, and remained so for the better part of an hour. It does not appear that he had ever been advised by any physician to take brandy for any ailment, or that he had any physical ailment, except that he testified that he was sometimes dizzy-headed. Why, in the morning, did he take brandy instead of food? It would appear from the hour at which he went on duty that there was abundant time to procure food, and there does not appear to have been any necessity for his taking brandy to sustain his strength or fit him for duty. Again, instead of carrying him brandy between twelve and one o'clock, why did not his wife take him food? Or why did he not get it; and if he had no time to get it, why did he not send her for it? There seems to have been no good reason for his taking two drinks of brandy upon an empty stomach. It does not appear that he had any reason to suppose that the brandy would be good for him, or that he needed it, or that there was any exigency requiring him to take it. He took it, knowing, as we must assume, its intoxicating nature, and he took the chances of intoxication, without, so far as appears, any excuse therefor. It does not furnish him an adequate defense, that he took the brandy upon his wife's advice. He was bound to exercise his own judgment, and must stand as if he voluntarily procured the brandy himself, his wife's connection with it being simply a mitigating circumstance.

We think, therefore, this case is unlike the *Hogan Case*, and that it is more like the *Masterson Case*. Here there was evidence from which the police commissioners could justly draw the inference that the intoxication of the relator was voluntary and blamable, and, therefore, we cannot interfere with their determination, affirmed, as it has been, by the Supreme Court. The case is one which appeals strongly to our sympathy. The police commissioner who took the evidence stated that the relator's record was a good one. It appears that he had been on the force eighteen years, and had served in the same precinct nearly seventeen years, and the

Opinion of the Court, per EARL, J.

sergeant in command of the precinct testified that he was an "A No. 1" officer; that he had never seen him under the influence of liquor, and that he was a faithful and good officer. A roundsman testified that he was a good officer; that he never knew him to drink anything; that he had the reputation of being a temperance man, and that he was never more surprised than when he saw him in a condition of intoxication. The relator testified that he was never in the habit of drinking; that he had been asked to drink and always refused. Taking the case as it appears to us, it was certainly a very severe punishment to dismiss the relator from the police force where he had so long and faithfully served; but the extent of the punishment rested entirely in the discretion of the commissioners, and neither the Supreme Court nor this court has any jurisdiction to interfere therewith.

We think the force and effect of the decision in the *Musterson Case* has been somewhat misapprehended. In determining the guilt of a police officer, who is on trial for charges preferred against him, the police commissioners cannot act upon their own knowledge. The charges must be tried upon evidence, and the guilt must be established by evidence produced before the commissioners upon the trial. They can neither act upon their own knowledge nor supplement the evidence by their own knowledge. But in inflicting the punishment they may take into consideration the evidence, as well as their own knowledge of the police officer, and inflict such punishment, authorized by the rules and the statutes, as in their judgment the case, in view of all the circumstances, requires. We did not determine in that case that the Supreme Court, upon certiorari, did not have jurisdiction to review the determination of the police commissioners upon the evidence, and it is a mistake to suppose that if there is any evidence in the record brought to the Supreme Court by certiorari sustaining the determination of the commissioners, that court has no right to interfere therewith. Such is the rule in this court, and such was the rule at common law. But now by section 2140 of the Code of Civil Procedure, upon the hearing on the return of a writ of certiorari, the Supreme

Opinion of the Court, per EARL, J.

Court may inquire whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination; and if there was such proof, whether there was "upon all the evidence such a preponderance of proof against the existence of any of those facts that the verdict of a jury affirming the existence thereof, rendered in an action in the Supreme Court, triable by a jury, would be set aside by the court as against the weight of evidence." Therefore, in all this class of cases, it is the duty of the Supreme Court not only to inquire whether there is any competent proof tending to establish the guilt of the accused officer, but it must look into the evidence, and if it finds that there is a preponderance of evidence against the determination of the commissioners, then it has the same jurisdiction to reverse the determination that it has to set aside the verdict of a jury as against the weight of evidence. It is the purpose of the law to give a review in the Supreme Court by certiorari, not only upon the law but upon the evidence, to the extent specified in the statute, and every party who seeks such a review is entitled to the fair and judicious exercise of that jurisdiction.

We do not perceive that the relator's right to call witnesses and have them sworn in his behalf upon his trial, was denied or curtailed by the police commissioner who took the evidence.

We are, therefore, constrained to affirm the order, but under the circumstances it must be without costs.

All concur but RUGER, Ch. J., and GRAY, J., who concur in result, on the ground that the case is not distinguishable from that of *People ex rel. Hogan v. French* (*ante*, p. 493) wherein they dissented, and O'BRIEN, J. who dissents.

Order affirmed.

Statement of case.

119	509
159	97

In the Matter of the Application of ALFRED ROE et al., as
Executors, etc., for Leave to Sell Real Estate.

Where a testator, in creating a trust in real estate, has withheld from the trustees a power of sale and organized the trust for a fixed period, it amounts to a direction that the land, not its proceeds shall be held for the beneficiaries, and a sale by the trustees would be in contravention of the trust, unless an emergency has arisen in which funds are required to save the estate from threatened loss, to improve it, where authority to improve is given, or to prevent serious and increasing injury.

Under the provisions of the act of 1886 (Chap. 257, Laws of 1886), which authorizes a sale of real estate, held in trust, whenever it appears "that it is for the best interest of the estate so to do, and that it is necessary and for the benefit of the estate to raise * * * funds for the purpose of preserving or improving such estate," to justify an order of sale some necessity must be shown to exist for the use of the money in the preservation or improvement of the property which the estate is not in a condition to supply, and which can only be supplied by borrowing upon a mortgage or selling a part and using the proceeds. A sale may not be ordered for the purpose of reinvestment and with a view only to increase the income, even though the real estate be unproductive.

The will of F. created a trust in her executors to receive the rents and profits of the trust estate and the accumulations therefrom, and "after payment of all taxes and assessments and of so much money as may be necessary for repairs, insurance or improvements, or betterments of any or all" of the real estate, to invest the balance as prescribed. An application under said statute for leave to sell certain of the real estate was based solely upon the ground that the sale and reinvestment of the proceeds would result in increasing the trust fund; no necessity for the sale was shown; on the contrary, it appeared the income after all the disbursements authorized, was ample for all the purposes of the trust. *Held*, that an order of sale was erroneously granted; that the improvements contemplated were not of the trust fund, but of the real estate, and of the class indicated by the other elements of the phrase used.

Reported below, 53 Hun, 433.

(Argued February 24, 1890; decided March 11, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made July 9, 1889, which reversed an order of Special Term granting an application to sell real estate.

This was an application by the petitioners, as trustees under the will of Elizabeth F. Floyd, deceased, for leave to sell three

Statement of case.

parcels of land held by them under the following provision of her will :

“*Sixth.*— I give, devise and bequeath to my executors hereinafter named, all real and mixed estate of which I may die seized or possessed in trust, nevertheless, to have and to hold the same during the respective lives of my son-in-law, George Thomas Vingut, and my youngest grandchild, Benjamin Van Horne Vingut, now living, and to receive the rents, issues and profits thereof and the accumulations arising therefrom, and after payment of all taxes, assessments, and of so much money as may be necessary for repairs, insurance or improvements or betterments of any or all of my real estate, to invest the balance remaining after such payments in productive real estate in the city of New York, for the benefit of my grandchildren who may be living at the time of my death during their respective minorities, and for the benefit of such other grandchildren as may be born of my daughter Sarah Augusta Vingut, after my death, during their respective minorities.”

The *cestuis que trustent* were all, but one, minors when the application was made.

The grounds upon which the application was made are stated in the opinion.

John J. Macklin for appellant. Chapter 257 of the Laws of 1886 is not unconstitutional. (Cooley on Const. Lim. 124.) The court had, independent of the statute, power to authorize the mortgaging of trust property in the cases specified by the General Term. (*U. S. T. Co. v. Roche*, 26 N. Y. S. R. 394.) Statutes similar to this are enacted for the purpose of authorizing the mortgaging of real property or converting it into personal, where it appears to the court to be for the best interests of the estate so to do or where a mortgage or sale would best effectuate the purpose of the trust and accomplish objects in the interests of the beneficiaries not otherwise attainable. (Cooley on Const. Lim. 117, 118; Potter's Dwaris on Stat. 73, 74, 231.)

Thomas T. Sherman for guardian *ad litem* respondent. The court had no power to make the order of sale. (*Goebel v.*

Statement of case.

Iffla, 48 Hun, 21; 111 N. Y. 170.) If the statute of 1886 empowers the court to make such an order of sale as the one in question here, the act is unconstitutional and void. (*Brevoort v. Grace*, 53 N. Y. 254; *In re P. E. School*, 31 id. 574; 53 id. 259; *Wilkinson v. Leland*, 2 Pet. 657.) The constitutionality of the act cannot be upheld with respect to this particular case upon the ground that the sale authorized by it, in so far as it relates to the interests of the infant, is valid, and as to the interests of those *sui juris*, is based upon their consent. (*Embury v. Connor*, 3 N. Y. 511.)

William V. Rowe for respondents George T. and George F. Vingut.

Prior to and independently of the statute (Chap. 257, Laws of 1886), there was ample power in the Supreme Court, as a court of equity, in the exercise of its general power and jurisdiction over trusts, to grant the relief prayed for in this petition, and to direct a sale of this unproductive property, and a reinvestment of the proceeds thereof, as provided in the will of Elizabeth F. Floyd, deceased, in productive real estate. (Const. art. 6, § 6; 2 Perry on Trusts, §§ 476, 477, 484, 526-528, 552, 764, 820; Hill on Trustees, 471; *Frith v. Cameron*, L. R. [12 Eq. Div.] 169; *Cowman v. Colquhoun*, 60 Md. 127; *Anderson v. Mather*, 44 N. Y. 261; 1 Perry on Trusts [4th ed.], §§ 321, 334, 335, 346; 1 R. S. 729, 730, §§ 60, 61, 67; *Perry v. Board of Missions*, 102 N. Y. 99, 106; *New v. Nicholls*, 78 id. 127; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *Greuson v. Keteltas*, 17 N. Y. 494; *Newcomb v. Keteltas*, 19 Barb. 608; 1 R. S. 730, § 65; *Stevenson v. Lesley*, 70 N. Y. 517.) The statute (Chap. 257, Laws of 1886, amending 1 R. S. 730, § 65), by its terms, when considered either alone or as an affirmative and declaratory statute in connection with the pre-existing law, upholding the general jurisdiction of a court of equity over the same subject, clearly justifies and authorizes the present application, and the order of the Special Term thereon, and does not in any respect alter the former law, or general jurisdiction of the court, under which

Opinion of the Court, per FINCH, J.

the petitioners may still proceed, if they so elect. (2 Coke's Inst. 200, 308; Bishop on Written Laws, §§ 75, 82, 144, 164; 1 Kent's Comm. 464; Sedgwick on Stat. & Const. Law, 29, 30.) Assuming that this application and the order of the Special Term are to be justified and supported only by the statute (Chap. 257, Laws of 1886), and that the application is brought clearly within the terms of the statute, and was in every sense properly granted thereunder, the contention which is here made, that the statute is unconstitutional and void by reason of the fact that it attempts to dispose of the interests of adult persons not laboring under any legal incompetency or incapacity, without their consent, is wholly unfounded. The statute is, in fact, subject to no constitutional objection. (Bishop on Written Laws, §§ 75, 82; *People v. Potter*, 47 N. Y. 375; *People v. Fancher*, 50 id. 288, 291; *Cochrane v. Van Surloy*, 20 Wend. 365, 375, 376; *Brevoort v. Grace*, 53 N. Y. 245; *Kerrigan v. Force*, 68 N. Y. 385; *People ex rel. v. Terry*, 108 id. 1, 7; *In re N. Y. E. R. Co.*, 70 id. 327, 342; *People v. Albertson*, 55 id. 50, 54-56; *Gage v. City of Brooklyn*, 89 id. 196; *People v. Kenney*, 96 id. 294, 302, 303; Cooley on Const. Lim. 180, 181; *People v. Green*, 58 N. Y. 295, 303; *Baker v. Braham*, 6 Hill, 47; *Embury v. Conner*, 3 N. Y. 511, 518, 519.)

FINCH, J. We approve of the construction adopted by the General Term in its examination of the statute under which authority was sought for the sale of the trust estate. (Laws of 1886, chap. 257). Such authority is given whenever it shall appear "that it is for the best interest of the estate so to do, and that it is necessary and for the benefit of the estate to raise by mortgage thereon or by a sale thereof funds for the purpose of preserving or improving such estate." Under this provision some necessity must exist for the use of money in the preservation or improvement of the property which the estate is not in a condition to supply, and which, therefore, can only be supplied by borrowing upon a mortgage or selling a part and using the proceeds. The permission given is in the nature of

Opinion of the Court, per FINCH, J.

an exception to a general rule which the statute itself formulates. It forbids any sale in contravention of the trust. Where the testator has withheld from the trustees power of sale, and organized the trust for a fixed period, it amounts to a direction that the land shall be held for the beneficiaries and not its proceeds, and any sale by the trustees would be in contravention of the trust. But emergencies might arise in which funds would be required to save the estate from threatened loss, or to improve it where authority to improve was given, or it should be needed to prevent serious and increasing injury. To meet that emergency power was conferred upon the court to order a mortgage or sale, but not at all to sell for the mere purpose of reinvestment and with a view only to increase the annual income. That in a given case may be what an adult owner in the free exercise of his ownership would do as a profitable business measure, taking his own risk in the exercise of his own judgment, but such is not the condition or the duty of a trustee holding land for an infant, even though it be unproductive. The land will not run away or burn up or be stolen, and will be sure to await the infant when the period of possession arrives, while if turned into money for reinvestment risks of loss arise, although the trustee be entirely honest. The court, therefore, always hesitates to sell the land of an infant, even where no trust envelopes and protects it, and surrounds the process with all manner of guards and protection, and where it is put in trust and its enjoyment postponed during a period of infancy without a power of sale given to the trustee, it should only be to meet an emergency, to answer a clear and apparent necessity that authority to sell should be given by the court. And that, we think, is the plain meaning of the statute.

It is contended, however, that we should attach to it a different meaning and allow it a wider range, and the contention is supported in an elaborate brief which examines the law before and since the statute, and with an ample collection of the authorities. But the argument comes down to one single proposition, and that is that land may be sold to "improve" the balance of the trust estate, and that increasing its value in

Opinion of the Court, per FINCH, J.

income or principal, or both, is the sort of "improvement" which the statute contemplates. The doctrine puts the court in the position of an owner striving for the greatest possible profit, instead of that of a trustee seeking first and foremost the safety and preservation of the trust estate. It is said the will authorizes the trustees to improve. Its meaning in that respect is not difficult to interpret. Its sixth clause defining the trust provides "after payment of all taxes, assessments and of so much money as may be necessary for repairs, insurance or improvements or betterments of any or all of my real estate to invest the balance," etc. The "improvements" contemplated and authorized were of the real estate, not of the trust fund, and of the class indicated by the other elements of the phrase used. And it is such improvements, rendered necessary in the ordinary and prudent care of the trust lands to which the statute refers.

In the present case no such improvements are shown to be necessary or even to be contemplated. The estate needs no additional money for its preservation. Its net income is \$24,000 a year, and ample for all the purposes of the trust besides taxes, assessments, improvements and betterments. The testatrix assumed that it would be, for she contemplated that a surplus of income would remain, and directed that to be invested in productive real estate. She hoped that land would be added by purchase, not parted with by sales. And so the application to the court for an order of sale rested solely upon the ground that such action would probably result in increasing the trust fund. Not the least necessity for a sale was shown; all burdens were and could be easily borne without it, and the reasons for a sale rested only upon a business prediction as to future values. That will not do. There must be something more to justify the interference of the court.

The order should be affirmed with costs.

All concur.

Order affirmed.

Statement of case.

THE PEOPLE ex rel. ELLEN NOSTRAND, Respondent, v.
THOMAS WILSON et al., Assessors, etc., Appellants.

119 515
142 278

Under the provisions of the charter of the city of Brooklyn (Tit. 18, §§ 4, 5, Chap. 863 Laws of 1873), making it the duty of the common council before ordering the grading or paving of a street "to lay out a district of assessment," and to cause a map to be made, designating the lots and parcels of land to be assessed for the improvement, and providing that the assessment shall be confined to said district, when a lot outside of the district is included in the assessment by mistake, the error is to be regarded as a clerical one, and so is included in the provision of the charter (Tit. 10, § 10) making it the duty of the board of assessors to rectify errors committed in assessments in certain cases, and among others "when the error is entirely clerical."

Mandamus is a proper remedy to compel the performance of this duty. When an order has been made granting the writ, the fact that it does not affirmatively appear that the relator, before the commencement of the proceedings, applied to the board to correct the mistake, is not a jurisdictional defect, requiring the reversal of the order.

Upon an application for a mandamus to compel the correction of such an assessment, it appeared that the board of assessors included by mistake, in an assessment for repaving, a lot of the relator outside of the district of assessment, and that the collector was proceeding to collect the same by levying on the relator's property. *Held*, the collector was properly joined as a party in the proceeding.

It was claimed that no remedy was open to the relator for the reason that the assessment had been confirmed by the common council, and that an assessment so confirmed is declared by the charter (Tit. 18, § 36) to be "final and conclusive." *Held*, untenable; that this provision did not apply to a case where the assessment is without jurisdiction and so void.

(Submitted February 24, 1890; decided March, 11 1890.)

APPEAL from order of the General Term of the City Court of Brooklyn, made November 25, 1889, which affirmed an order of Special Term directing a peremptory writ of mandamus to issue.

The relator was the owner of a lot in the city of Brooklyn which it was alleged and not denied was by mistake included in an assessment for repaving, being outside of the district fixed by the common council for the assessment of the

Statement of case.

expense of said improvement. Upon the collector proceeding to enforce the assessment by levying on the relator's property, the latter instituted this proceeding, making said collector a party, to compel the assessors to strike out the assessment and the tax against his lot and to restrain the collection thereof. The petition alleged that the lot was included in the assessment by mistake.

Further facts are stated in the opinion.

Almet F. Jenks and *William T. Gilbert* for appellants. No duty has been cast by law upon the board of assessors to correct the assessment in question by striking therefrom the assessment upon relator's lot. (Laws of 1873, chap. 862; *Hermance v. Bd. of Super.*, 71 N. Y. 481, 486; Laws of 1869, chap. 85; Laws of 1871, chap. 695.) To entitle relator to a writ of mandamus he must show himself legally and equitably entitled to some right properly the subject of the writ, and that it was legally demanded from the person to whom the writ must be directed. (*People ex rel. v. Clark, etc.*, 3 Abb. Pr. 309, 320; *People ex rel. v. Canal Appraisers*, 73 N. Y. 443, 447; Laws of 1873, chap. 862, § 34; *People ex rel. v. Hoyt*, 66 N. Y. 656; *People ex rel. v. Gerow*, Id. 606.) The confirmation of said assessment by the common council was final and conclusive, and the assessment cannot now be attacked. (*In re Kiernan*, 62 N. Y. 457; *In re Sharp*, 56 id. 257; *Litchfield v. Vernon*, 41 id. 123; *In re Central Park*, 50 id. 493, 496; *Barhyte v. Shepherd*, 35 id. 238; *Matter of Brady*, 69 id. 215, 219; *Matter of Parks*, 73 id. 560, 565.)

Sidney V. Lowell for respondent. No appeal lies in the matter, because it is from a judgment, and the matter in controversy is less than \$500. (Code, § 191; *People ex rel. v. Willard*, 18 N. Y. S. R. 604; *Roger v. Sandy Hill*, 94 N. Y. 638.) The writ is properly directed to the board of assessors and the collector of taxes and assessments. (Laws of 1888, chap. 583, pp. 46, 47, 69; *People ex rel. v. Brooklyn*, 71 N. Y.

Opinion per Curiam.

495.) The points made by appellants that the city of Brooklyn had advanced the amount of the assessment and would lose the \$200 sought to be imposed on relators which it should have assessed on other land, and that the relator should have been compelled to take some other proceeding than mandamus, are not tenable. (Laws of 1888, chap. 583, § 15; *People v. Assessors*, 44 Barb. 148; *Barhyte v. Shepherd*, 35 N.Y. 255; *People v. Olmstead*, 45 Barb. 644; *People v. Super.*, 4 Hill, 20; *Clementi v. Jackson*, 92 N. Y. 591; *Cooper v. Register of Arrears*, 114 id. 19; *People v. Super.*, 70 id. 229; *People v. Super.*, 85 id. 612; *People v. Super.*, 51 id. 401.)

Per Curiam. There was no denial of the facts stated by the relator in the affidavit upon which the motion for the mandamus was based. The defendants opposed the granting of the writ, without putting in issue any of the facts alleged in the affidavit, nor does it appear what objections were interposed. The most favorable view for the defendants, is to treat the proceeding on their part as in the nature of a demurrer, raising the question whether the facts stated in the moving affidavit were sufficient in law to entitle the relator to the relief sought. (*People ex rel. v. Board of Apportionment*, 64 N. Y. 627.) It appears from the uncontradicted facts that the board of assessors by mistake included in their assessment list the lot of the relator which was not within the district of assessment fixed by the common council for the assessment of the expense of the improvement in question, and was not liable to assessment therefor, and that the collector of taxes was proceeding to collect the assessment by levying the same on the property of the relator.

The assessment upon the facts presented was absolutely void. By the Brooklyn charter, it is made the duty of the common council before ordering the grading or paving of a street or avenue to "lay out a district of assessment," and to cause a map to be made designating the lots and parcels of land to be assessed for the improvement, and it provides that the assessment shall be confined to the district of assessment so laid

Opinion *per Curiam*.

out. (Laws of 1873, chap. 963, tit. 18, §§ 4, 5.) It is made the duty of the board of assessors (by necessary implication, if not by express words) to levy the assessment for a local improvement on the lands included within the assessment district. (Tit. 10, § 3; tit. 18, § 32, *et seq.*) The intentional inclusion by the board of assessors in the assessment list of lands not within the district of assessment, would be a violation of their duty and a wrong to the owner of the property.

By section 10, of title 10, of the act of 1873, power is conferred upon the board, and it is made their duty to rectify any errors committed in the laying of any tax and assessment in certain specified cases, and among others "where the error is entirely clerical." Upon the admitted fact that the relator's property was inserted in the list by mistake, the error must, we think be regarded as clerical. The admission that the plaintiff's lot was put in by mistake, naturally excludes any idea that it was inserted in the exercise of any judgment or discretion, or in pursuance of any determination that the lot was included within the district of assessment. It does not import that the board acted upon any misconception of the law, or of their duty, but that by mere inattention, or rather without any intention, in some way in making up the list the relator's lot was inserted. This construction is certainly justified in the absence of all explanation on the part of the defendants.

Mandamus was a proper remedy to compel the performance of the duty of correcting the error, and the collector of taxes was properly joined in the proceeding to restrain him from proceeding to collect the illegal tax. The remedy by mandamus has been sustained in analagous cases. (*People v. Assessors*, 44 Barb. 148; *People v. Olmsted*, 45 id. 644; *People ex rel. v. Supervisors*, 4 Hill, 20; *Barhyte v. Shepherd*, 35 N. Y. 255.) Under the charter of Brooklyn the assessment list remains in the custody of the board of assessors.

The objection that it does not affirmatively appear that the relator had applied to the board of assessors before commencing the proceeding is not a jurisdictional defect, and the omis-

Statement of case.

sion is not, under the circumstances, such substantial error as requires the reversal of the order.

The point that no remedy is open to the relator, for the reason that the assessment has been confirmed by the common council, and that an assessment where so confirmed is declared by the statute to be "final and conclusive" (Tit. 18, § 36), is not, we think, well taken. This provision cannot be construed as applying to a case where the assessment is utterly void and illegal, and without jurisdiction. *People ex rel. v. City of Brooklyn*, 71 N. Y. 495.)

The order and judgment should be affirmed.

All concur.

Order affirmed.

JOSEPHINE M. McBRIDE, Respondent, v. ROBERT P. McBRIDE, Appellant.

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e 75	AD ⁵⁶⁶
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f 78	AD ⁵⁷⁸

In an action for divorce, brought by the wife, a motion for a temporary allowance and counsel fee was denied by the Special Term, on the ground that final judgment had been rendered for plaintiff, awarding her alimony and costs, and that, although the defendant had appealed therefrom and procured a stay, and the wife had no means of support or for defending the appeal, yet the court was without power to grant the relief desired. This order was reversed by the General Term, and the case remitted to the Special Term for a decision on the merits. *Held*, that the order of the General Term was not final, and so was not appealable to this court.

It seems, that power exists in such a case to make the allowance sought during the pendency of the appeal from the judgment and until the final determination of the action. (Code Civ. Pro. § 1769.)

Winton v. Winton (31 Hun, 290), questioned.

Kamp v. Kamp (59 N. Y. 212); *Erkenbach v. Erkenbach* (96 id. 456), distinguished and explained.

It seems, also, that the court below, in the exercise of its discretion, may and should require, as a condition of the allowance, that plaintiff stipulate that the sums allowed shall, in case of an affirmance of the judgment, be applied by her as payment *pro tanto* thereon.

Reported below, 55 Hun, 401.

(Argued February 24, 1890; decided March 11, 1890.)

Opinion of the Court, per FINCH, J.

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made January 28, 1890, which reversed an order of Special Term denying a motion for alimony and counsel fees pending appeal from final judgment.

The nature of the appeal and the material facts are stated in the opinion.

Preston Stevenson for appellant. The order of the General Term is appealable. (*S. Bank v. Alberger*, 78 N. Y. 252; *E. L. Co. v. Stevens*, 63 id. 341.) The construction given to the statute by the General Term respecting the allowance of alimony and counsel fees cannot be sustained. (2 R. S. chap. 8, §§ 58, 59; Code Civ. Pro. §§ 245, 1200, 1346, 1628, 1767, 1769-1773; 103 N. Y. 402; *Winton v. Winton*, 31 Hun, 290; *Cullen v. Cullen*, 23 J. & S. 346; *Wells v. Wells*, 10 N. Y. S. R. 248; 49 Barb. 174, 175; 36 How. Pr. 114; 35 Hun, 89; 5 Abb. [N. C.] 326; 9 id. 323.)

W. Bourke Cockran and *Samuel C. Adams* for respondent. The order of the General Term is not appealable. (*Catlin v. Grissler*, 57 N. Y. 363; *Crosby v. Stephan*, 97 id. 606; *Roe v. Boyle*, 81 id. 305; *In re Latz*, 110 id. 661.) The court had power to make the order asked for. (*Riggs v. Palmer*, 115 N. Y. 506; 15 Abb. Pr. [N. S.] 307; *Wood v. Wood*, 7 Lans. 204; *Moncrief v. Moncrief*, 15 Abb. Pr. 187; Code, § 1769.)

FINCH, J. The Special Term denied a motion for a temporary allowance and counsel fee in an action for a divorce, upon the ground that final judgment had been rendered for the plaintiff, awarding to her alimony and costs; and that, although the defendant had appealed from that judgment and procured a stay of proceedings, and the wife had no means of support or for defending the appeal available in the emergency, yet the court was without power to grant her the desired relief. The General Term reversed this order, holding that power existed to make the allowance sought, although judgment had

Opinion of the Court, per FINCH, J.

been entered in the action, and remitted the case to the Special Term for a decision upon the merits of the application. From that order the present appeal is taken.

The appeal must be dismissed. The order of the General Term is not final. The Special Term is yet to act upon the application, and may refuse it upon the merits. We cannot know in advance what the ultimate determination will be ; but since the question of power has been fully argued before us and an expression of our opinion may save another appellate journey from the Special Term to this court, we have deemed it best to express our concurrence in the conclusion of the General Term that power exists to make the allowance during the pendency of the appeal and until the ultimate determination of the action. The Special Term followed the decision in *Winton v. Winton* (31 Hun, 290), and some other cases in the Supreme Court, which merge every right of the plaintiff in the final judgment, and deny the power of the court thereafter to make a temporary allowance. No case in this court appears to have decided the question. In *Kamp v. Kamp* (59 N. Y. 212) and *Erkenbach v. Erkenbach* (96 id. 456), the applications were made many years after judgment, in the absence of any appeal, and when by lapse of time, no appeal was possible. The actions were no longer pending, jurisdiction over the parties had ceased, and all questions as to the alimony were decided by and referable to the judgments entered ; but in this case, although a judgment, final for the purposes of an appeal, is entered, the action is still pending. The jurisdiction over the parties remains through the further steps regularly taken, and the action is in no sense or respect ended. By the terms of section 1769 of the Code, the allowance may be made "from time to time," "during the pendency" of the action, and is described "as necessary to enable the wife to carry on or defend the action." That is one of the purposes to be subserved, and the need of it is quite as pressing and obvious after the judgment and pending the appeal as before. It could not have been contemplated that before judgment the wife should be aided in maintaining her rights, but after judgment in her

Statement of case.

favor, should be left to starve during the pendency of an appeal, and should be disarmed by her very success from defending the judgment in her favor.

The suggestion that by granting the motion the defendant's stay of proceedings will be violated and impaired, and that if the judgment is affirmed he may, in effect, be compelled to pay the same amount twice over, have these answers, that the allowance sought is temporary and may be much less than the permanent alimony which has been stayed, and the court in the exercise of its discretion may, and should require as a condition of the allowance, that the plaintiff stipulate that the sums allowed shall, in case of an affirmance of the judgment, be applied by her as payment *pro tanto* thereon. These views will enable the Special Term to act understandingly, and we hope may serve to obviate the need of an appeal from its order.

The appeal should be dismissed, with costs.

All concur.

Appeal dismissed.

BERNARD CASSERLY, as Receiver, etc., Appellant, v. SILAS H. WITHERBEE et al., Respondent.

In an action brought by plaintiff, as receiver of the P. H. S. & I. Co., the complaint alleged in substance that said company executed to defendants' firm chattel mortgages on all its property, consisting of buildings, machinery, tools, etc.; that default having been made in payment, defendants took possession of the property and sold it at auction, they bidding it in for \$1,000; that none of the property was in view of the persons attending the sale; that it was all put up in a lump and sold together at the request of defendants, although they knew it could be sold in parcels, and greater sums realized for it if so sold; that none of the company's officers were present; that since the sale defendants have claimed to own the property and have sold \$10,000 or \$15,000 of it; that at the time of the sale the property was worth about \$60,000, and the company's indebtedness to defendants did not exceed \$20,000. The relief asked was that defendants be required to account for the value of the property, and after application of sufficient to extinguish the debt secured that plaintiffs have judgment for the balance. A demurrer to the complaint was sustained because of the omission of an averment of a tender to defendants of the amount conceded to be due and unpaid on the mortgages, or an offer to pay that amount on its being ascertained.

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Statement of case.

Held, error; that the sale to defendants was voidable and could be vacated and set aside as part of the relief in this action; that the amount received by defendants on the sales made by them was applicable and must be deemed to have been applied upon the mortgages, and the property remaining in their hands to be held as security for the balance due; that a tender before suit, or an offer in the complaint to pay was not necessary and the omission thereof was only important as bearing upon the question of costs; that the facts alleged in the complaint were sufficient to show a right of redemption in plaintiff and the action should be treated as one to redeem and for such incidental relief as is necessary to accomplish the redemption.

It seems that in such an action payment of the amount found due should be required by the judgment, upon, and as a condition of redemption, and that a dismissal of the complaint on default of payment under the judgment would operate as a foreclosure.

It seems, also, the fact that on foreclosure of a chattel mortgage, the mortgagee becomes the purchaser, does not itself render the sale void.

(Argued February 26, 1890 ; decided March 11, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 28, 1888, which affirmed a judgment sustaining a demurrer to the complaint, entered upon an order of Special Term.

The nature of the action and the material facts are stated in the opinion.

Henry Bacon for appellant. The demurrer can only be sustained if, upon the facts alleged and admitted, the plaintiff is not entitled to any relief. (*Emery v. Pease*, 20 N. Y. 62; *Hale v. O. N. Bank*, 49 id. 626; *Marie v. Garrison*, 83 id. 14; *Kingsland v. Stokes*, 25 Hun, 107; *Pierson v. McCurdy*, 61 How. Pr. 134.) The plaintiff is entitled to commence and prosecute this action. (Laws of 1858, chap. 314; *Atty.-Gen. v. G. M. L. Ins. Co.*, 77 N. Y. 272.) The plaintiff, not being the mortgagor, nor solely its representative, was not bound under the circumstances of this case either to tender the amount due before suit brought, or to offer in his complaint to pay the amount found due, were he seeking by this action solely a redemption of the property. No tender was required. (*Dunning v. Humphrey*, 24 Wend. 31; *People v. Sternburgh*,

Statement of case.

1 Den. 635; *Wilson v. Little*, 2 N. Y. 449; *Wheeler v. Garcia*, 40 id. 584; *Currie v. White*, 45 id. 822; *Delavan v. Duncan*, 49 id. 485; *Hartley v. James*, 50 id. 38; *Haynes v. A. P. Ins. Co.*, 69 id. 435; Code Civ. Pro. § 481.) The plaintiff was entitled to compel an accounting by the defendants. (*Sheldon v. Loper*, 14 John. 352; *Cresson v. Stout*, 17 id. 116; *Pulver v. Richardson*, 3 T. & C. 436; *Shimer v. Mosher*, 39 Hun, 153; *Buffalo S. E. Works v. S. M. Ins. Co.*, 17 N. Y. 403; *Craig v. Tappen*, 2 Sandf. Ch. 79-90; *Hoyt v. Monteuse*, 16 N. Y. 231; *Bragelman v. Dane*, 69 id. 69; *Coe v. Cassedy*, 72 id. 133, 138; *Davenport v. McChesney*, 86 id. 242; *King v. Van Vleck*, 109 id. 363; *Case v. Boughton*, 11 Wend. 106; *Charter v. Stevens*, 3 Den. 33; *King v. Van Vleck*, 40 Hun, 68.)

Chester B. McLaughlin for respondent. This appeal brings up for review in this court only the determinations of the General Term, affirming the interlocutory judgment. (Code Civ. Pro. § 1336; Baylies on N. T. & App. 213; *C. V. N. Bank v. Lynch*, 76 N. Y. 514; *Campbell v. N. Y. C. Exchange*, 15 J. & S. 558; *Kaiser v. I. A. F. & B. Co.*, 20 id. 557; *Raynor v. Raynor*, 94 N. Y. 250; Code, § 1536.) The complaint does not state facts sufficient to constitute a cause of action. Plaintiff has not paid or tendered, or offered in the complaint to pay, the amount remaining due upon the mortgages. (*Ballou v. Cunningham*, 60 Barb. 425; *Chamberlain v. Martin*, 43 id. 607; *Halstead v. Swartz*, 1 T. & C. 562; Thomas on Mort. & Sales, 22; *Coe v. Cassidy*, 72 N. Y. 138; *Stoddard v. Dennison*, 38 How. Pr. 296; *Hulsen v. Walter*, 34 id. 385; *Porter v. Parniley*, 49 id. 453; *Case v. Boughton*, 11 Wend. 106.) Relief in equity can be granted only upon payment or tender of payment of the whole mortgage debt. That must be averred and proved, as it lies at the foundation of the only remedy the plaintiff has. (*Stoddard v. Dennison*, 38 How. Pr. 306; *Brush v. Evans*, 21 J. & S. 523; *Polk v. Lord Clinton*, 12 Ves. 48-59; *Halstead v. Swartz*, 46 How. Pr. 289; *Hall v. Ditson*, 5 Abb. [N. C.] 198; *Lambush v. Miller*, 38 N. J. Eq. 117; 4 Kent's Com. 162, 163, 164; Thomas on Mort. & Sales, § 218; *Edmiston v. Brunker*, 40 Hun, 256.)

Opinion of the Court, per EARL, J.

EARL, J. In his complaint the plaintiff alleges that in June, 1887, in an action in the Supreme Court against the Port Henry Steel and Iron Company, limited, he was duly appointed the permanent receiver of that company; that he duly qualified and was then acting as such; that the defendants were copartners in business, and during the year 1886 the iron company became indebted to them in the sum of \$17,086.84; that on the tenth day of August in that year it executed to them chattel mortgages on "all buildings, machinery, erections, tools, fixtures and appliances, hoisting engine and all machinery and apparatus connected therewith, placed by it upon the premises known as the Cedar Point Furnace and land adjacent, together with all scraps of iron owned by it and in its possession at Port Henry, N. Y.;" that the mortgages, by their terms and conditions, became due and payable on or before the 1st day of January, 1887, and the amount secured by them not having been paid, on the 10th day of January, 1887, the defendants took actual possession of the property described in them, and thereafter caused a sale to be made thereof at auction, at which they bid in the same for the sum of \$1,000; that the sale was irregularly made and unfairly conducted, and no portion of the property was visible, in sight or in view of the person or persons attending the sale; that all the property was put up for sale in a lump and sold together at the request of the defendants, although they well knew that the property could be sold separately and greater sums realized therefor if sold in parcels; that none of the officers of the corporation were present at the sale; that ever since the property was taken by defendants they have claimed to be the legal owners thereof and still hold and retain the same, except that since the sale they have sold some portion thereof, realizing from such sale between the sum of \$10,000 and \$15,000; that at the time the property was taken by defendants and sold, the value of the same was about \$60,000, and the indebtedness due from the defendants to the corporation on the mortgages did not exceed the sum of \$20,000; that the defendants claim to be creditors of the company for the balance of the indebtedness

Opinion of the Court, per EARL, J.

secured by the mortgages after deducting the sum of \$1,000, amounting to \$18,281.59 with interest from August 10, 1886; and the prayer for judgment is as follows: "Wherefore, by reason of the premises, the plaintiff demands judgment and decree of this court that said defendants account to the plaintiff herein for the true and full value of the property so taken and sold by them at the time the same was so taken, retained and sold as hereinbefore stated, and that the value thereof so to be ascertained be applied in payment and extinguishment of the debt secured by said mortgages referred to, and that plaintiff herein have judgment against said defendants for the balance, together with such other and further relief in the premises as may be just and equitable with the costs and disbursements of this action."

The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The judge at Special Term sustained the demurrer on the ground, as appears from his opinion, that the plaintiff should have alleged in the complaint a tender of the amount confessedly due and unpaid upon the mortgages; and the judgment of the Special Term was sustained by the General Term, as appears from its opinion, because the plaintiff omitted to show "either a tender of the amount conceded to be due to the defendants, or an offer to pay that amount upon its being ascertained and established at the trial."

The plaintiff, as receiver of the iron company, occupies its place in this action, and has the same right to maintain the action that it would have had if no receiver had been appointed. After default in the payment of the mortgages, at law the title of the defendants became absolute, and they were the general owners of the property mortgaged. Thereafter the mortgagor could maintain no action whatever at law against them. All that remained to it was a right of redemption, which could only be enforced in an equitable action. (*Charter v. Stevens*, 3 Den. 33; *Stoddard v. Denison*, 38 How. Pr. 296; *Bragelman v. Daue*, 69 N. Y. 69.)

The fact that upon the sale by the defendants under the

Opinion of the Court, per EARL, J.

mortgage, they became the purchasers, does not, of itself, render the sale void. (*Olcott v. T. R. R. Co.*, 27 N. Y. 546; *Edmiston v. Brucker*, 40 Hun, 256; *King v. Walbridge*, 48 id. 470; *Elliott v. Wood*, 45 N. Y. 71; *Hall v. Ditson*, 5 Abb. [N. C.] 198.) But the other facts alleged in the complaint show that the sale was void, or if not void, that it was certainly voidable; and it could be vacated and set aside, if necessary, as part of the relief in this action. A sale, in bulk, for \$1,000, of property worth \$60,000, consisting of a large number of articles, when the property was not present or visible to the persons attending the sale, in the absence of any of the officers of the mortgagor, could not stand either in a court of law or of equity for one moment. Therefore, after that sale the defendants still remained in possession of the property, as before, and the mortgagor's right of redemption was not cut off thereby. The defendants subsequently sold between \$10,000 and \$15,000 of the property, as we must infer, at private sale. That sale was valid, if fairly made. (*Chamberlain v. Martin*, 43 Barb. 607; *Ballou v. Cunningham*, 60 id. 425; *Coe v. Cassidy*, 72 N. Y. 133.) The amount received upon the sale of such property was applicable, and must be deemed to have been applied upon the mortgages, and the balance of the property remained in their hands as security for the balance due upon the mortgages. The defendants, upon any facts alleged in the complaint, could not be compelled to take that at a valuation, and the only right of the plaintiff in reference thereto was a right of redemption, upon paying the balance due upon the mortgages. (*Bragelman v. Daue*, *supra*.)

The facts alleged in the complaint are sufficient to show in the plaintiff a right of redemption from the mortgages, and this action should be treated as one to redeem; and in it the plaintiff may have such incidental relief as is necessary to accomplish the redemption. He may have an accounting so as to determine the amount due upon the mortgages, and judgment giving him the right to redeem upon payment of that amount.

As a condition to his right to maintain this action it was not necessary for the plaintiff, before the commencement thereof, to tender or offer to pay the balance due upon the mortgages. Nor was it necessary for him to offer in his complaint to pay the amount which should be found due. There are, undoubtedly, authorities laying down the rule in general terms, that before an action to redeem from a mortgage can be maintained, the mortgagor must either tender the amount due upon the mortgage, or offer to pay the amount in his complaint. But it has never been so decided in this court, and we think it is now the settled law in this state, under our present system of pleadings, that the allegation of such a tender or offer is unnecessary. It certainly is not necessary to allege that a tender or offer to pay the amount due upon the mortgage was made before the commencement of the action; and an offer in the complaint is at most a technical matter, serving no substantial purpose, because in the judgment given in such an action the court always provides that redemption can be had upon payment of the amount due. The tender and offer are important only, as they have bearing upon the question of costs. The mortgagor's right of redemption is not dependent upon his offer or tender of payment. It exists independently thereof, and antecedently thereto. The tender or offer is not needed to put the mortgagee in default, and if made, no relief can be based thereon as the rights of the parties are not changed thereby, and independently thereof are always taken care of and regulated in the judgment. Payment upon redemption and as a condition of redemption can be enforced in the action, and the dismissal of the complaint in such an action, on default of payment under the judgment, as a condition of redemption, operates as a foreclosure. (*Bishop of Winchester v. Paine*, 11 Vesey, 194.)

In *Quin v. Brittain* (Hoff. Ch. 353), it was held that it was not essential in a bill to redeem to offer to pay the amount due upon the mortgage; that in such a suit there is no decree for payment, but the bill is dismissed in default of payment, and then the decree becomes equivalent to a foreclosure. The

learned vice-chancellor, in that case, said: "It is objected that there is not in the bill an offer to pay the amount due. I do not find in the precedents that such an offer is distinctly made. The form is that upon the payment of what, if anything, shall be found due in respect to principal and interest, the mortgagee may be decreed to deliver possession. Neither can it be essential, because no decree is ever made upon such a bill for the payment of the amount personally. If the amount found due is not paid, there is a decree of dismissal, with costs, which is equivalent to a decree for foreclosure." In *Beach v. Cook* (28 N. Y. 508), it was held that in an action to redeem from a mortgage it was not necessary that the complaint should contain an express general offer to pay any balance which might be found due. SELDEN, J., writing the opinion of the court, said: "There is no express general offer to pay any balance which might be found due; but it was held under the former system of pleading that such an offer in a bill to redeem was not necessary, and it is certainly not indispensable now. * * * The case, therefore, was in form, one in which it was proper to allow the plaintiff to redeem, and I can discover nothing in his position to render such redemption unjust or inequitable. * * * If he fails to redeem within the time appointed, the dismissal of his complaint as the consequence of such failure, operates as a foreclosure of the mortgage." (See, also, *Miner v. Beekman*, 11 Abb. [N. S.] 147, 160.)

We are, therefore, of opinion that this complaint, with its prayer for general and specific relief, was sufficient for an action to redeem from the mortgages, and that, therefore, the judgments of the Special Term and of the General Term were wrong and should be reversed, and the plaintiff should have judgment upon the demurrer, with costs in all the courts, unless the defendant shall, within thirty days from the filing of the remittitur in the court below, pay the costs subsequent to the service of the demurrer, and interpose an answer to the complaint

All concur.

Judgment accordingly.

Statement of case.

BYRON J. STROUGH, Appellant, v. GEORGE WILDER, Impleaded,
etc., Respondent.

The possession of a deed by the grantee is *prima facie* evidence of delivery, when there is nothing to impeach the *bona fides* of his possession.

In an action for partition, plaintiff claimed title, under deeds, from the heirs of S. W., who died intestate. The defendant G. W., a son of the deceased, claimed under a deed from her, which was neither acknowledged nor its execution attested by a subscribing witness; its execution was proved by two witnesses who were present at the time, and no attempt was made to show that her signature thereto was not genuine. The fact of delivery was not directly proved, but defendant produced the deed and proved that it was drawn by a scrivener, pursuant to the directions of the grantor. Two witnesses testified to declarations of S. W., to the effect that she intended G. W. to have the premises described in the deed, and, that from the time of its execution until S. W.'s death, several years thereafter, it was in the custody of G. W. It also appeared that G. W. rented the premises to others, paid taxes and made repairs, and during his mother's life, after the deed had been executed, exercised such control over the property as usually attends ownership. *Held*, the testimony justified a finding that the deed was executed and delivered. Also *held*, that plaintiff was not a "purchaser" within the provision of the Revised Statutes (1 R. S. 738, § 137), which declares that an unacknowledged and unattested deed "shall not take effect as against a purchaser or incumbrancer until so acknowledged;" that the title under the deed was good, as between the parties, and also, against her heirs or one claiming from them, as the grantor, on her death, was neither seized nor had she any title to the land in question, and the heirs took and could convey nothing. An heir who takes by descent is not a purchaser in the eye of the law and does not hold the estate descended by purchase.

The word "purchaser," in said statute, means one who derives title by purchase from the grantor in the unacknowledged and unattested deed, or from one who, himself, is either mediately or immediately a purchaser from such grantor.

Reported below, 49 Hun, 405.

(Argued February 28, 1890 ; decided March 11, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made July 2, 1888, which affirmed a judgment in favor of defendant, entered upon the report of a referee.

This was an action for the partition of real estate.

The material facts are stated in the opinion.

Statement of case.

Wayland F. Ford for appellant. By express statute, the deed, not being acknowledged, and having no subscribing witness thereto, is of no effect against the plaintiff. (3 R. S. 2194; *Chamberlain v. Spragur*, 86 N. Y. 605; 22 Hun, 437; *Roggen v. Avery*, 63 Barb. 65; 65 N. Y. 592; Kent's Comm. 450; *Genter v. Morrison*, 31 Barb. 158; *Elsey v. Metcalf*, 1 Den. 323; 1 R. S. 148, 150.) The referee finds that the occupancy of George Wilder was under said deed, and that the occupancy was adverse. (*Jackson ex dem. v. Stevens*, 16 Johns. 116; *Jackson ex dem. v. Sears*, 10 id. 436; *Kellogg v. Kellogg*, 6 Barb. 128; *Jackson ex dem. v. Johnson*, 5 Cow. 74; *Doe v. Thompson*, Id. 371; *Jackson v. Britton*, 4 Wend. 507; *Reformed Church v. Schoolcraft*, 5 Lans. 206; *Cook v. Jarvis*, 20 N. Y. 400; *Stevens v. Hauser*, 39 id. 302; *Miller v. Downing*, 54 id. 631; *East Hampton v. Kirk*, 68 id. 465; *Bedell v. Shaw*, 59 id. 46, 50; *Howard v. Howard*, 17 Barb. 667; *Miller v. L. I. R. R. Co.*, 71 N. Y. 386; *Thompson v. Burhans*, 61 id. 52; *Helton v. Bender*, 60 id. 79; *Smith v. Burtis*, 9 Johns. 174; *Livingston v. P. I. Co.*, 9 Wend. 516; Code, § 370; *Burhans v. Van Zandt*, 7 N. Y. 527; *Bliss v. Johnson*, 94 id. 242; *Varick v. Eden*, 2 Wend. 167.) As to the statement in the opinion of the General Term that the purchaser mentioned in the statute is limited to a purchaser from the grantor, and would not embrace a purchase from an heir, the case of *Roggen v. Avery* is an authority that the power of disposition retained by the grantor is a property right and interest in the land, for in that case the right passed to a devisee under the designation of "all my property." (4 R. S. [8th ed.] 2469; *Chamberlain v. Spragur*, 86 N. Y. 608.) The exceptions were well taken. The questions and answers involved personal transactions between the witness and his deceased mother, and were incompetent under section 829 of the Code. (*Holcomb v. Holcomb*, 94 N. Y. 317; 95 id. 316; *Grey v. Grey*, 47 id. 554; *Johnson v. Spies*, 5 Hun, 468; *Jacques v. Carle*, 7 id. 676; *Chaffee v. Goddard*, 42 id. 147; *Pease v. Barnett*, 30 id. 525; *Boughton v. Bogardus*, 35 id. 199; *Stewart v. Patterson*, 37 id. 113; *Campbell v.*

Statement of case.

Hubbard, 38 id. 306; *Smith v. Smith*, 40 id. 401; *Resseguie v. Mason*, 58 Barb. 89; *Chadwick v. Fonner*, 69 N. Y. 404, 407, 409; *Pinney v. Orth*, 88 id. 447; *Adams v. Morrison*, 113 id. 152; *Mills v. Davis*, Id. 243; *In re Eysenase*, Id. 62.) The plaintiff is entitled to maintain the action of partition. (Code Civ. Pro. §§ 1532, 1543, 1544; *Beebe v. Griffin*, 14 N. Y. 238; *Howell v. Mills*, 7 Lans. 195; *Brownell v. Brownell*, 19 Wend. 369; *Weinman v. Hampton*, 20 Wkly. Dig. 68; *Hitchcock v. Skinner*, Hoff. Ch. 21; *Sisson v. Cummings*, 106 N. Y. 50; *Culver v. Rhoades*, 87 id. 348; *Zeller's Lessee v. Eckert*, 4 How. [U. S.] 295; *Barr v. Gratz*, 4 Wheat. 213; *McClung v. Ross*, 5 id. 124; *Challefoux v. Ducharme*, 8 Wis. 287; *Long v. Mast*, 11 Penn. St. 189; *Bennett v. Bullock*, 35 id. 364; *Hall v. Stevens*, 9 Metc. 418; *Kathan v. Rockwell*, 16 Hun, 91; *Jackson v. Tibbitts*, 9 Cow. 252; 4 Kent's Comm. 368; *Wilkins v. Wilkins*, 1 Johns. Ch. 111; *Carr v. Smith*, 4 id. 271; *Burhans v. Burhans*, 2 Barb. Ch. 398.) The evidence will not warrant the finding of any delivery of the instrument by Susannah Wilder to George Wilder. (*Ford v. James*, 2 Abb. Ct. App. Dec. 159; *Best v. Brown*, 25 Hun, 224; *Brackett v. Barney*, 28 N. Y. 340; *Knowles v. Barnhart*, 71 id. 474; *Stewart v. Stewart*, 50 Wis. 445; *Genter v. Morrison*, 31 Barb. 158; *Elsev v. Metcalf*, 1 Den. 323; *Wilsey v. Dennis*, 44 Barb. 354; *Hibbard v. Smith*, 67 Cal. 547; *Roberts v. Jackson*, 1 Wend. 478; *Fitzgerald v. Goff*, 99 Ind. 28; *Stillwell v. Hubbard*, 20 Wend. 47; *Graves v. Dudley*, 20 N. Y. 76; *Jackson ex dem. v. Sharp*, 9 Johns. 167; *Brandt v. Ogden*, 1 id. 156; *Jackson v. Baird*, 4 id. 230.)

Watson M. Rogers for respondent. A delivery may be inferred from very slight circumstances, even where the instrument is left in possession of the grantor. (*Bunn v. Winthrop*, 1 Johns. Ch. 329; *Souverbey v. Arden*, Id. 240; *Perry on Trusts*, § 103; *Scrugham v. Wood*, 15 Wend. 545.) Acceptance will be presumed from the beneficial nature of the grant. (*Jackson v. Bodle*, 20 John. 184; *Church v. Gil-*

Statement of case.

man, 15 Wend. 656.) The deed, though unacknowledged, was good and effectual to pass title as between the parties to it. (*Wood v. Chapin*, 13 N. Y. 509, 514; 4 R. S. [8th ed.] 2451, § 137; *Jackson v. La Frombois*, 8 Cow. 589; *Briggs v. Prosser*, 14 Wend. 227; *Hooper v. A. W. Works*, 44 Hun, 568-573; *Abrams v. Rhoner*, Id. 507-510; *Sands v. Hughes*, 53 N. Y. 287-296; *Reformed Church v. Schoolcraft*, 65 id. 133-144; *Bradstreet v. Clark*, 12 Wend. 603-675; *Jackson v. Norton*, 18 Johns. 355-362; *Wooley v. Morss*, 19 Hun, 275; 2 R. S. [8th ed.] 2453; 18 Johns. 355; *Hilton v. Bender*, 4 T. & C. 270; *Claff v. Bromagham*, 9 Cow. 530; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 739; *Munro v. Merchant*, 28 N. Y. 9; *Pearce v. Moore*, 114 id. 256; *Becker v. Van Valkenburg*, 29 Barb. 319; *Ottinger v. Strasburger*, 33 Hun, 466-470.) The acts of the defendant were open and notorious. (*Christie v. Gage*, 2 T. & C. 344; 71 N. Y. 186; 116 id. 34 18 Johns. 355.) This action is barred by the Statute of Limitations. (Code, § 365; *Munro v. Merchant*, 28 N. Y. 9; *Sands v. Hughes*, 53 id. 287-296; *R. Church v. Schoolcraft*, 65 id. 133-144.) The deeds to the plaintiff by persons out of possession were absolutely void. (4 R. S. [8th ed.] 2453, § 147; *Christie v. Gage*, 2 T. & C. 344; *Pearce v. Moore*, 114 N. Y. 256.) The plaintiff's original entry in April, 1884, was a bald, naked trespass without color or claim of right. (*Sullivan v. Sullivan*, 66 N. Y. 37; *Florence v. Hopkins*, 46 id. 182; *Van Schuyler v. Mulford*, 59 id. 426; *Culver v. Rhodes*, 87 id. 348.) No error was committed by the referee in overruling the plaintiff's objections to the questions: "Since what time have you had the paper in your possession?" and "state to the referee how long this paper has been in your possession in same condition it now is." (Code, § 828; *Simmons v. Sisson*, 26 N. Y. 277; *Lobdell v. Lobdell*, 36 id. 333, 334; Code, § 829; *Cary v. White*, 59 N. Y. 336-339; *Wadsworth v. Hermans*, 85 id. 639; *Pinny v. Orth*, 88 id. 447, 451; *Simons v. Havens*, 101 id. 428-433.) The plaintiff says he paid Alvaro Wilder (one of the grantors) three dollars. He proved the assessed valuation of the

Opinion of the Court, per ANDREWS, J.

entire lot to be forty dollars. This shows the amount in controversy is much less than \$500, and so the case is not appealable. (*Trevett v. Barnes*, 110 N. Y. 500; Code, § 191, subd. 3.)

ANDREWS, J. The finding of the referee that Susannah Wilder executed and delivered to the defendant the deed of June 20, 1855, is supported by evidence and has been confirmed by the General Term. The execution of the deed by the grantor was proved by two witnesses who were present at the time, and no attempt was made on the trial to show that the signature to the deed was not genuine. The fact of delivery was not directly proved by an eye witness. But the defendant produced the deed, and the possession of a deed by the grantee is *prima facie* evidence of delivery, where there is nothing to impeach the *bona fides* of his possession. The other circumstances proved on the part of the defendant, confirm the presumption of delivery arising from possession of the deed. It was shown that it was drawn by a scrivener, pursuant to the directions of the grantor. The sister of the defendant testified to declarations of her mother, the grantor, to the effect that she intended that the son should have the lot in question. She also testified that from the time of the execution of the deed until the mother's death, several years thereafter, the deed was in the custody of the defendant and was kept by him in a box with his other papers. The defendant's wife was permitted, without objection, to testify to the same fact. The defendant rented the house, paid taxes and made repairs on the premises, and during his mother's life, after the deed had been executed, exercised such control of the property as usually attends ownership. If the evidence on the part of the plaintiff can be regarded as casting any doubt upon the point whether there was an absolute delivery of the deed, with intent to pass the title to the property, we are concluded by the finding in favor of the defendant.

The plaintiff claims title to an undivided part of the premises in question, under deeds from some of the heirs of

Opinion of the Court, per ANDREWS, J.

Susannah Wilder (who died intestate July 15, 1868), executed after her death. The deed from Susannah Wilder to the defendant was neither acknowledged by her nor was its execution attested by a subscribing witness. The plaintiff insists that for this reason the deed was void as to the plaintiff under the statute (1 R. S. 738, § 137) which declares that an unacknowledged and unattested deed "shall not take effect as against a purchaser or incumbrancer until so acknowledged." The conclusive answer to this claim is that the plaintiff is not a purchaser within the meaning of the statute. The word "purchaser" in this statute means one who derives title by purchase from the grantor in the unacknowledged and unattested deed, or from one who himself is mediately or immediately a purchaser from such grantor. The word purchase, as designating the origin and nature of title to real property, has a technical but well settled meaning. It includes every mode of acquisition of an estate in land known to the law, except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of the law. (Burrill's Dic. tit. Purchase.) The heir who takes by descent is not a purchaser, and does not hold the estate descended by purchase. He may, when he has come into the inheritance, originate a title by purchase, upon his conveyance to another, but his own title is not such. The statute uses the word purchase in its technical sense. It is well settled that the title under an acknowledged and unattested deed duly delivered, is good as between the parties. This is so both under the statute and at common law. (*Wood v. Chapin*, 13 N. Y. 509; *Dole v. Thurlow*, 12 Metc. 157.) The grantor cannot reclaim the estate conveyed, in contravention of his deed, nor can his heirs. Both are bound by it. The statute does not aid the grantor's heirs, for the reason that they are not purchasers, and as to them the statute has no application. On the death of Susannah Wilder, she was neither seized nor had she any title to the land in question, and the heirs took no other estate by descent than such as was vested in her at her death. Their conveyance to the plaintiff conveyed

Statement of case.

nothing, because they had no interest to convey. The defendant's deed, which was good as against Susannah Wilder, was good also against her heirs or those claiming title from them.

This disposes of the case. We think it unnecessary to consider whether the exception taken to the question put to the defendant as to the time during which he had possession of the deed, was well taken. It would be difficult to sustain the ruling under our recent decision in *Clift v. Moses* (112 N. Y. 426). Excluding, however, the defendant's evidence on this point, there is left the uncontradicted evidence of two unimpeached witnesses to the fact that the deed was in his possession after its execution, during his mother's life.

We find no error in the record prejudicial to the plaintiff, and the judgment should be affirmed.

All concur.

Judgment affirmed.

JAMES TALCOTT, Appellant, v. HORTON HARDER et al,
Respondents.

The fact that an insolvent debtor, after the commencement of bankruptcy proceedings against him, transferred property, by way of preference, to a creditor, in violation of the provisions of the Bankrupt Act, is not, under the laws of this state, any evidence of fraud.

Where, therefore, on trial of an action to set aside a conveyance of real estate made by an insolvent debtor, as executed to hinder, delay and defraud creditors, the court excluded evidence offered by plaintiff to the effect that prior to the conveyance, bankruptcy proceedings had been commenced against the grantor and an order issued therein restraining him from making any distribution of the property, *held*, no error.

(Argued March 8, 1890; decided March 11, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 1, 1888, which affirmed a judgment in favor of the defendant entered upon the report of a referee.

This action was brought to vacate, as fraudulent, a conveyance of real estate made by defendant, Horton Harder, who,

Statement of case.

it was conceded, was at the time insolvent, to defendant Nicholas W. Harder, and a conveyance of the same property from Nicholas W. Harder to Mary G. Harder, wife of the insolvent.

The facts, so far as material, are stated in the opinion.

S. F. Kneeland for appellant. The referee erred in excluding the testimony relating to the proceedings in bankruptcy on the day of the transfer. (*Starin v. Kelley*, 88 N. Y. 421.) The transfer by the defendant, Horton Harder, to his brother, Nicholas W. Harder, was fraudulent in fact and in law. (*Wood v. Hunt*, 38 Barb. 302; *Newman v. Cordell*, 43 id. 443; *Ericsson v. Quinn*, 47 N. Y. 410; *Starin v. Kelley*, 88 id. 421; *Cole v. Tyler*, 65 id. 73; *Garrison v. Monaghan*, 33 Penn. St. 232; *Parker v. Crane*, 6 Wend. 647; *Mayor, etc., v. McCarty*, 102 N. Y. 631; *Hubbard v. Allen*, 59 Ala. 283; *Chadwick v. Founner*, 69 N. Y. 404.) The erroneous statement of the consideration in a deed standing alone is a badge of fraud. (Wait on Fraud. Con. § 228.) The transfer from Nicholas W. Harder to Mary G. Harder is fraudulent. (*Newman v. Cordell*, 43 Barb. 448; *Hubbard v. Allen*, 59 Ala. 283.) The plaintiff showed a right to affirmative relief on the ground that the transfer operated as a security only. (*Elliott v. Wood*, 53 Barb. 285; *Murray v. Walker*, 31 N. Y. 399; *White v. Moore*, 1 Paige, 551; *Williams v. Thorn*, 11 id. 459; *Bolles v. Duff*, 10 Abb. [N. S.] 399, 403.) The positive denial of fraud in an answer will not prevail against admissions, in the same pleading, of facts which show the transactions to be fraudulent. (*Robinson v. Stewart*, 10 N. Y. 190; *Clements v. Moore*, 6 Wall. 299; 23 Abb. [N. C.] 394.)

Esek Cowen for respondent. The complaint was properly dismissed, as the defendants were both purchasers for value, and no proof of any notice to them of fraud was given. (*People v. McCarthy*, 102 N. Y. 638; *Jackson v. McChesney*, 7 Cow. 360; *Wood v. Chapin*, 13 N. Y. 509.) A party who receives property in satisfaction of an existing indebtedness, actual or contingent, is a purchaser for value, within the mean-

Opinion of the Court, per PECKHAM, J.

ing of the act in relation to fraudulent conveyances. (*Murphy v. Griggs*, 89 N. Y. 446; *Seymour v. Wilson*, 19 id. 42; *Birdseye v. Ray*, 4 Hill, 163.) A verbal assumption of an incumbrance is valid. (Jones on Mort. § 750; *Wilson v. King*, 23 N. J. Eq. 150; *King v. Whitely*, 10 Paige, 465; *Trotter v. Hughes*, 12 N. Y. 74.) No merger was intended. (*James v. Mowry*, 2 Cow. 246.) Mrs. Harder having assumed the mortgage and promised to pay it, would be estopped from claiming a merger. (*Reed v. Latson*, 15 Barb. 9.)

PECKHAM, J. The referee found that Nicholas W. Harder was a purchaser from Horton Harder (the judgment debtor and the original owner), for a valuable consideration and that there was no proof charging him with any knowledge of an intent on the part of Horton Harder to defraud his creditors, if such intent existed. The referee also found that Mary G. Harder was a purchaser from Nicholas W. Harder for a valuable consideration without notice of any alleged design of Horton Harder to defraud.

These findings are supported by the evidence and there is no admission in any of the answers at war with them, and the answers were not read in evidence.

The plaintiff, however, claims the referee erred in excluding evidence offered by him for the purpose of showing, as alleged in his complaint, that bankruptcy proceedings had been commenced against the defendant Horton Harder, the day on which his deed to Nicholas W. Harder bears date, and that an order had been issued, in such proceedings, restraining him from making any disposition of his property, and that such order had been served on Horton before he executed his deed to Nicholas.

This proof was objected to on the ground that it was immaterial and incompetent, and the objection was sustained and the plaintiff excepted. The plaintiff claims this proof was admissible as part of the *res gestæ*, "and that as any transfer was void under the bankrupt law, it necessarily tends to hinder and delay creditors, if any such transfer was

Opinion of the Court, per PECKHAM, J.

made.” It was a violation of the bankrupt law to give a preference, and if proceedings had been taken by an assignee in bankruptcy, under that law, such transfer might have been avoided.

But a transfer, by an insolvent, by way of preference to a creditor, was not illegal under our state law, and as this is a proceeding under that law the defendants’ acts must be judged by it. Every creditor, it is true, had the right to the protection and benefit of the bankrupt law, and if the plaintiff had sought it in the forum, where such law could be invoked, it may be assumed that he would have obtained it.

It cannot be contended that, under the law of this state, there was any evidence of fraud in the mere fact of a preference being given by an insolvent debtor, if there were no bankruptcy proceeding pending. How is the pendency of such proceeding of the least materiality in the jurisdiction which permitted a preference to be given?

The fact that the debtor had executed this deed when he was insolvent, would be very good ground, in an action under the bankrupt law, to set aside such conveyance as a fraud under the act, whether he knew proceedings had at that time been commenced against him or not, but I do not see how it is in the least material to show a fact which, when proved, would have no effect upon the right of the grantor to make the deed, so far as the state law is concerned. It was admitted that Horton Harder was insolvent in April, at the time he made this deed, and so proceedings in bankruptcy were wholly immaterial to show that fact.

The bankruptcy proceedings never resulted in the appointment of an assignee, and nothing further is alleged in the complaint, than that such proceedings were commenced and a restraining order issued. The most that could be claimed for this evidence would be, that it tended to show an intent to violate, or a clear violation of the Bankruptcy Act, in giving preferences to creditors or in making transfers of property, and that fact does not show, or tend to show, any fraud upon creditors under our state law.

Statement of case.

Under such circumstances the existence of proceedings in bankruptcy is no part of the *res gestæ* in an action in the state court to set aside the conveyance as executed to hinder, delay and defraud creditors.

The fact of such a transfer in violation of the act, does not in an action in our state court necessarily or at all tend to hinder, delay or defraud creditors, as claimed by the counsel for the plaintiff, for it was a transfer which was permitted by our state law, and to do what the law permits is not a fraud.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

GEORGE W. DEAN, Respondent, v. THE METROPOLITAN
ELEVATED RAILWAY COMPANY, Appellant.

In an action at law to recover for an injury in the nature of a trespass to real estate, the plaintiff's rights can be determined only in accordance with the situation existing when the action was commenced; where his title is put in issue he must stand or fall by the title and right to recover he then had, and no other.

In an action brought to recover alleged damages caused by the unlawful construction and maintenance of defendant's railroad in the street in front of plaintiff's premises, the question litigated was as to plaintiff's title and possession. Plaintiff was allowed to give in evidence, under objection and exception, a deed of the premises executed to him after the commencement of the action. *Held*, error.

Plaintiff gave in evidence a deed to himself, executed in 1860, and proved that, from the time of its delivery up to the commencement of the action, he received the rents and profits of the premises. Defendant thereupon put in evidence a deed from plaintiff to his wife which did not express any valuable or meritorious consideration. *Held*, that this conveyance did not show title out of plaintiff.

Statutes changing the common law are to be strictly construed, and it will be held to be no further abrogated than the clear import of the language used in the statutes absolutely requires.

The common-law disabilities incident to the relation of husband and wife still exist, except so far as they have been swept away by express enactment.

Prior to the passage of the act of 1887 (Chap. 537, Laws of 1887), a deed of lands from husband to wife, or from wife to husband, was void, and

Statement of case.

did not operate to divest the grantor of title unless founded upon valuable or meritorious consideration such as would enable a court of equity to sustain it.

The burden is upon a party claiming, under such a deed, to prove such a consideration.

Defendant also introduced in evidence a deed from plaintiff and wife to R.

Plaintiff then introduced a deed to his wife from R. and wife, and a deed from his wife to himself, all of which conveyances were duly acknowledged and recorded shortly after their respective dates. Plaintiff testified that the deed to R. was to secure a loan of \$2,300, which he paid, and then R. and wife reconveyed the premises to plaintiff's wife. Defendant's counsel requested the court to charge that the jury were not bound to believe plaintiff's statement that the deed to R. was a mortgage, he being an interested party and not having called anyone to corroborate him. Also, that if said deed and the one from R. to plaintiff's wife were intended to pass the title to the property to her, the verdict must be for defendant. These requests were refused. *Held*, error.

It seems that if the deed to R. was in fact a mortgage, his conveyance to plaintiff's wife and her conveyance to plaintiff operated to discharge the mortgage.

(Argued March 6, 1890; decided March 11, 1890.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made May 9, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edward S. Rapallo and *Brainard Tolles* for appellant. The learned trial judge erred in refusing to dismiss the complaint, because the plaintiff was never in possession of the premises in question. (*Webb v. Odell*, 49 N. Y. 585; *Cook v. Whipple*, 55 id. 157; *Winslow v. Bliss*, 3 Lans. 223; *A. B. & C. Co. v. Pratt*, 10 Hun, 445; *Uline v. N. Y. C. R. R. Co.*, 101 N. Y. 98; *Lahr v. M. E. R. Co.*, 104 id. 268; *Pond v. M. E. R. Co.*, 112 id. 186, 290; *Ottenot v. N. Y., L. & W. R. Co.*, 28 N. Y. S. R. 483; *Henderson v. N. Y. C. R. R. Co.*, 8 N. Y. 423; *N. Y. N. E. Bk. v. N. Y. E. R. Co.*, 108 id. 660; *Glover v. M. R. Co.*, 19 J. & S. 1; *Doyle v.*

Statement of case.

Lord, 64 N. Y. 432; *Spies v. Damm*, 54 How. Pr. 294; *Holmes v. Seeley*, 19 Wend. 509; *Campbell v. Arnold*, 1 Johns. 511; Code Civ. Pro. § 1665; *Van Deusen v. Young*, 29 N. Y. 9; *Vedder v. Vedder*, 1 Den. 257; *Duryea v. Mayor, etc.*, 26 Hun, 120; *Taylor v. M. R. Co.*, 53 id. 309; *Tobias v. Cohn*, 36 N. Y. 363; *Thompson v. Gibson*, 7 M. & W. 456; *Simpson v. Savage*, 1 C. B. [N. S.] 347; *Mumford v. O. W. & W. R. Co.*, 1 H. & N. 34; *Sherman v. F. R. I. W. Co.*, 84 Mass. 524; *U. R. R. Co. v. English*, 73 Ga. 366; *Halsey v. L. V. R. R. Co.*, 45 N. J. L. 26; *Smith v. Phillips*, 8 Phil. 10; *Francis v. Schoelkopf*, 53 N. Y. 152; *Jutte v. Hughes*, 67 id. 271; *Colrick v. Swinburne*, 105 id. 507.) The learned trial judge erred in refusing to dismiss the complaint, because the plaintiff had no title to the premises in question. (*Wisner v. Ocumpaugh*, 71 N. Y. 113; *Hollingsworth v. Flint*, 101 U. S. 591; *Prouty v. L. S., etc., R. R. Co.*, 85 N. Y. 272; *Post v. Weil*, 26 N. Y. S. R. 131; *P., etc., R. Co. v. Quigley*, 21 How. [U. S.] 202; *Ervin v. O. R. & N. Co.*, 28 Hun, 269; *Dorrance v. Henderson*, 27 id. 206; *Tiffany v. Bowerman*, 2 id. 643; *Cobb v. Curtiss*, 8 Johns. 470; *Bostwick v. Menck*, 4 Daly, 68; *McCullough v. Colby*, 4 Bosw. 603; *Watson v. Thibou*, 17 Abb. Pr. 184; *F. & L. T. Co. v. U. L. T. Co.*, 47 Hun, 315; *Taylor v. M. R. Co.*, 53 id. 305; *Holly v. Graf*, 29 id. 444; *Doe v. Howland*, 8 Cow. 277; *Jackson v. Stevens*, 16 Johns. 110; *Branham v. Mayor, etc.*, 24 Cal. 605; Code Civ. Pro. § 544; *Hall v. Olney*, 65 Barb. 27; *Holyoke v. Adams*, 59 N. Y. 233; *Lyon v. Isett*, 2 J. & S. 31; *Garner v. Hannah*, 6 Duer, 262; *T. A. R. Co. v. N. Y. E. R. Co.*, 19 Abb. [N. C.] 261; *White v. Wager*, 25 N. Y. 328; *Winans v. Peebles*, 32 id. 423; *Hunt v. Johnson*, 44 id. 27; *Meeker v. Wright*, 76 id. 262, 271; *Bertles v. Nunan*, 92 id. 152; *Blaesi v. Blaesi*, 3 N. Y. S. R. 432; *Fruhauf v. Bendheim*, 24 id. 761; *Alward v. Alward*, 17 id. 868; *Hendricks v. Isaacs*, 27 id. 449; Laws of 1880, chap. 472; *Coleman v. Burr*, 93 N. Y. 17; *Zornlein v. Bram*, 100 id. 12; *Fitzgerald v. Quann*, 109 id. 441; *Mangam v. Peck*, 111 id. 401; *T. N. Bank v. Guenther*, 17 N. Y. S. R.

Statement of case.

405; *White v. Wood*, 18 id. 59; *Shepard v. Shepard*, 7 Johns. Ch. 57; *Tallinger v. Mandeville*, 113 N. Y. 432; *Simmons v. McElwain*, 26 Barb. 419; *Johnson v. Rogers*, 35 Hun, 267; *Townshend v. Townshend*, 1 Abb. [N. C.] 81; *Dominick v. Michael*, 4 Sandf. 374; *Radford v. Carwile*, 13 W. V. 683; *Sims v. Rickets*, 31 Ind. 181; Laws of 1848, chap. 200; Laws of 1860, chap. 90; Laws of 1862, chap. 172; *Thompson v. Comrs.*, 79 N. Y. 54; *Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Bank of Albion v. Burns*, 46 N. Y. 170; *E. C. S. Bank v. Roop*, 80 id. 591; *Martin v. Rector*, 101 N. Y. 77; *Hawes v. Curtiss*, 52 L. T. 244.) The learned trial judge erred in refusing to submit to the jury the question whether the conveyance by the plaintiff to Roosevelt and by Roosevelt to Mrs. Dean were intended to vest the legal title in her. (*Munoz v. Wilson*, 111 N. Y. 295; *Sipple v. State*, 99 id. 287; *Wohlfahrt v. Beckert*, 92 id. 490; *Honegger v. Wettstein*, 94 id. 253; *Gildersleeve v. Landon*, 73 id. 432; *Kavanagh v. Wilson*, 70 id. 177; *Elwood v. W. U. T. Co.*, 45 id. 553; *Blaesi v. Blaesi*, 3 N. Y. S. R. 432; *Nicholson v. Connor*, 8 Daly, 222; *Lesser v. Wunder*, 9 id. 70; *Posthoff v. Schreiber*, 47 Hun, 593; *Dey v. Dunham*, 2 Johns. Ch. 182; 15 Johns. 555; *White v. Moore*, 1 Paige, 551; *Warner v. Winslow*, 1 Sandf. Ch. 430.)

Charles E. Whitehead for respondent. The plaintiff was in uninterrupted and actual possession of the premises, by reason of receipts of rents, since 1860, under claim of title, and may maintain an action of trespass against a wrong doer. (*Gardner v. Heart*, 1 N. Y. 528; *Stookwell v. Phelps*, 34 id. 362; *Bogert v. Haight*, 20 Barb. 251; *Alexander v. Hard*, 64 N. Y. 228; *Barry v. H. F. Ins. Co.*, 110 id. 1; *Odell v. Montrose*, 68 id. 499; *McMaster v. Ins. Co.*, 55 id. 222; *Trimm v. Marsh*, 54 id. 599, 607; *White v. Wager*, 25 id. 328; *Robinson v. Ryan*, 25 id. 320; *Ruggles v. Barton*, 13 Gray, 506; *Fryer v. Rockefeller*, 63 N. Y. 268, 275; *Jenkins v. Fahey*, 73 id. 355; *Pierce v. Nichols*, 1 Paige, 244; *Brown v. Haff*, 5 id. 235; *Timoney v. Hoppock*, 13 Civ. Pro. Rep.

Statement of case.

361.) The evidence as to the vibration or jar of passing trains was proper. (*N. C. R. R. Co. v. Holland*, 10 Cent. Rep. 746; *In re U. C. R. R. Co.*, 56 Barb. 456; *In re N. Y. C. R. R. Co.*, 15 Hun, 63; *In re L. R. R. Co.*, 29 Hun, 1; *B. & P. R. R. Co. v. B. Church*, 108 U. S. 355; *Cogswell v. N. H. R. R. Co.*, 103 N. Y. 10, 25; *Ireland v. M. E. R. Co.*, 20 J. & S. 450; *Drucker v. M. R. R. Co.*, 106 N. Y. 164; *W. P. R. R. Co. v. Hill*, 6 P. F. Smith, 460.) The court was not bound to charge *seriatim* the requests of the defendant. (*Fay v. O'Niell*, 36 N. Y. 11; *Zabriskie v. Smith*, 13 id. 322, 338; *Bulkley v. Keteltas*, 11 Sandf. 450.) The exceptions to evidence of rentals and the course of rentals of the property before and after the erection of the railway, cannot avail. That this is the correct rule for the measure of damage is now well settled. (*Drucker v. M. R. Co.*, 106 N. Y. 157, 164; *Taylor v. M. R. Co.*, 18 J. & S. 1; *Uline v. N. Y. C. & H. R. R. R. Co.*, 101 N. Y. 98; *Colrick v. Swinburne*, 105 id. 503; *Glover v. M. R. Co.*, 19 J. & S. 1; *Griswold v. M. R. Co.*, Com. Pleas, Gen. Term, March, 1888.) The defendant objected to the evidence of plaintiff's witnesses as to rental values, on the ground that they were not experts. (*Bedell v. L. I. R. R. Co.*, 44 N. Y. 367; *Jarvis v. Furman*, 25 Hun, 391; *Slocovitch v. O. M. Ins. Co.*, 108 N. Y. 56.) The evidence offered as to the effect of the elevated railroad on Sixth avenue property not adjacent to Amity street was properly excluded. (*Peyser v. M. R. Co.*, 13 Daly, 122.) The class of tenants, the changes made in the property, and the rentability of property were pertinent to the issue. (*Drucker v. M. R. Co.*, 106 N. Y. 157, 163; 19 J. & S. 429.) Interest on the loss of rents was properly allowed to the time of trial. (*Mairs v. M. R. E. Assn.*, 89 N. Y. 498, 507; *Walrath v. Redfield*, 18 id. 457.) The exceptions to the charge, allowing the jury to discriminate as to the causes of damage, and to the refusals to charge that the annoyances complained of affected the tenant and not the owner, or that no recovery could be had for the injury to light, etc., are clearly untenable. (*Drucker v. M. R. Co.*, 106 N. Y. 157;

Opinion of the Court, per O'BRIEN, J.

19 J. & S. 429; *Lahr v. M. R. Co.*, 104 N. Y. 268; *Glover v. M. R. Co.*, 19 J. & S. 1.) The verdict of the jury was fully warranted by the evidence. (*Green v. Fortier*, 80 N. Y. 640.)

O'BRIEN, J. The plaintiff brought this action for, and recovered a verdict of \$2,205 damages against the defendant by reason of the unlawful construction and maintenance of its railroad structure in front of his premises in West Third street in the city of New York. The defendant admits that the damages awarded are not excessive, and that there is no reason for disturbing the verdict, providing the plaintiff has shown such title to and possession of the premises as enables him to bring and maintain the action. It is contended by the defendant that, upon the proofs given at the trial, the plaintiff had neither title nor possession, and, therefore, the recovery cannot be upheld.

The plaintiff gave in evidence a conveyance of the property and an assignment of the cause of action to him from his wife, executed and delivered after the suit was commenced, and in fact during the trial. These instruments were properly objected to by the counsel for the defendant, but were admitted by the trial court, and the defendant excepted. The court held, as matter of law, that the papers, in connection with other proofs of title, which will be referred to hereafter, estopped the wife from ever after making any claim to the property or the cause of action, and established title in the plaintiff.

It is quite clear that this proof was not admissible. The action was at law to recover for an injury in the nature of a trespass to plaintiff's real estate, and his rights could be determined only in accordance with the situation existing when the action was commenced. He must stand or fall with such title and right to recover as he then had, and no other. (*Wisner v. Ocumpaugh*, 71 N. Y. 113; *Prouty v. L. S. & M. S. R. R. Co.*, 85 id. 272; *Hollingsworth v. Flint*, 101 U. S. 591.)

Unless there was other conclusive evidence in the case to establish the plaintiff's title, the judgment cannot be upheld.

Opinion of the Court, per O'BRIEN, J.

The plaintiff produced and put in evidence a deed to him from Isaac C. Deleplain and wife, dated September 6, 1860, and it was shown that from the delivery to him of this deed to the commencement of the action he had received the rents and profits of the premises. If the title conveyed to the plaintiff by this deed has not been divested by the conveyances subsequently made, and which will be presently referred to, then his right to maintain this action would be clear enough, and the deed and assignment from his wife, executed at the trial and above referred to, might be regarded as immaterial. But in order to show title out of the plaintiff, the defendant gave in evidence a deed from the plaintiff to his wife, dated April 28, 1879. Whether this instrument operated to divest the title of the plaintiff under the Deleplain deed of 1860, depends upon the effect to be given to a deed from husband to wife. The disability of husband and wife to convey lands to each other was wholly removed by the passage of chapter 537 of the Laws of 1887, but the question here must be determined with respect to the condition of the law upon this subject as it existed prior to the passage of that statute. It is not necessary now to cite authority in support of the proposition that a deed of lands from the husband to the wife, or from the wife to the husband, was void at common law. By the enactment of the statute just referred to the legislature recognized that rule as then existing. Fourteen years after the passage of the act of 1848 this court held that the common-law disability still continued, notwithstanding the legislation in behalf of married women (*White v. Wager*, 25 N. Y. 328); and three years later this rule was again reiterated (*Winans v. Peebles*, 32 N. Y. 423). More recently it was held that under a conveyance of lands to husband and wife jointly, they take, not as tenants in common or as joint tenants, but as tenants by the entirety, and upon the death of either, the survivor takes the whole estate. (*Bertles v. Nunan*, 92 N. Y. 152.) This result was reached by the application of the common-law doctrine of the unity of husband and wife, and that conveyances of this character were not affected by

Opinion of the Court, per O'BRIEN, J.

the legislation in this state, in regard to the property of married women, and the cases of *White v. Wager* and *Winans v. Peebles* (*supra*) were both cited approvingly, in support of the rule that the common-law disability of husband and wife, growing out of their unity of person, to convey to each other, still existed. This court has quite recently held that the rule of the common law which made the husband liable for the torts of his wife, has not yet been abrogated. (*Fitzgerald v. Quann*, 109 N. Y. 441; *Mangam v. Peck*, 111 id. 401.) The decision in all the cases proceeded upon the ground that statutes changing the common law are to be strictly construed, and the latter will be held to be no further abrogated than the clear import of the language used in the statute absolutely requires, and hence that the common-law disabilities incident to the relation of husband and wife still exist, except in so far as they have been swept away by express enactments. As there was no statute prior to the year 1887, changing the common law with respect to deeds of land between husband and wife, it follows that the deed from the plaintiff to his wife did not operate to divest his title, unless the consideration was such as to enable a court of equity to uphold it. It is true that conveyances of real estate between husband and wife, though void at law, are sustained in equity when founded upon a valuable or meritorious consideration. (*Shepard v. Shepard*, 7 Johns. Ch. 57; *Hunt v. Johnson*, 44 N. Y. 27; *Tallinger v. Mandeville*, 113 id. 432.) This rule, however, requires the party setting up or claiming under the deed, to show such facts and to establish a consideration requiring a court of equity to sustain it. In the cases where equity interferes to sustain a deed between husband and wife, an equitable consideration must be shown, either upon the face of the conveyance itself or by extraneous proof. The defendant did not, in this case, erect any obstacle to the plaintiff's right of recovery by producing and putting in evidence a deed from the plaintiff to his wife expressing no equitable consideration. To accomplish the defendant's purpose, it was incumbent upon it to go further and show that the deed was in fact

Opinion of the Court, per O'BRIEN, J.

given for such purpose, and upon such consideration as would require a court of equity to sustain it as operative to divest the husband of title. The plaintiff had *prima facie* shown title in himself through the Deleplain deed of 1860, and his receipt of the rents and profits from that time to the commencement of the action, and it then rested with the defendant to show that the deed to the wife was of such a character, and based upon such a consideration, as to change this title. The defendant cannot now insist that the deed is good in equity as it failed to prove any fact upon which such a claim can be predicated. This was the situation when the defense closed; but both parties gave further evidence bearing upon the title, which greatly embarrasses the question now. The defendant gave in evidence a deed from the plaintiff and wife to James A. Roosevelt, dated June 9, 1880, and recorded immediately thereafter, and then the plaintiff produced another from Roosevelt and wife to Estelle Dean, the wife of plaintiff, dated September 28, 1880, and still another from his wife Estelle directly to himself, dated June 22, 1881, all of which conveyances were duly acknowledged and recorded shortly after the respective dates thereof. The plaintiff then testified that the conveyance by himself and wife to Roosevelt was to secure the payment to the grantee of \$2,300, which he paid in full in about three months thereafter, and that then Roosevelt and wife conveyed the premises back to his wife. This testimony was not contradicted, and if it was conclusive it proved that the deed to Roosevelt was a mortgage, and that the money secured thereby having been paid, the plaintiff's title was again reinstated; that Roosevelt's deed to Mrs. Dean was nothing but the assignment of a paid-up mortgage, and that her title was precisely that which Roosevelt had before the conveyance to her by him, and nothing more, and, therefore, her deed to her husband of June 22, 1881, is not embarrassed by the common-law disability of a wife to convey land to her husband, because her conveyance was operative simply to discharge Roosevelt's mortgage lien of record. It has been repeatedly held that a husband or wife may assign or transfer personal property

Opinion of the Court, per O'BRIEN, J.

directly to each other. (*Armitage v. Mace*, 96 N. Y. 538; *Whiton v. Snyder*, 88 id. 299; *Rawson v. P. R. R. Co.*, 48 id. 216; *Phillips v. Wooster*, 36 id. 412.)

Hence the right of the wife in this case to assign to her husband, through the form of a conveyance, a paid up mortgage which came to her hands from Roosevelt cannot be doubted. After the extinguishment of Roosevelt's lien by payment, the subsequent conveyances by him to the wife, and by her to the plaintiff, could give no other right than to enable the grantee to discharge the mortgage of record and place the title in the same condition that it was in when the lien was given. This result, however, must depend upon the testimony of the plaintiff, who alone testified that the conveyance to Roosevelt, absolute upon its face, was in fact given as security for a debt which he paid. Nor is there any other fact or circumstance in the case to corroborate his testimony. He was an interested party, and here at this point the plaintiff's case encounters a difficulty that we think is fatal to this judgment.

The defendant's counsel requested the court to charge the jury as follows: "That the jury are not bound to believe the plaintiff's statement that the deed given by himself and wife to Mr. Roosevelt was a mortgage, and not a conveyance, because he is an interested witness; the papers on their face purport to be deeds, and not mortgages, and he calls no other party to the transaction to corroborate his statements." And he also requested the court to charge "that if the jury find that the conveyance of Dean and wife to Roosevelt, and the conveyance of Roosevelt to Mrs. Dean in 1880, were intended to pass the title of this property to Mrs. Dean, as appears on the face of the deeds, then the verdict in this case must be for the defendant." The court refused to charge either of these propositions and the defendant's counsel excepted. It was possible for the jury to find, in accordance with the view suggested by the requests, that it was the intent of all the parties to these conveyances to vest the title in Mrs. Dean; and besides, the testimony of the plaintiff that the deed to Roosevelt was in fact a mortgage, was

Statement of case.

not conclusive, for the witness was an interested party. The testimony by means of which it was sought to convert a deed, absolute in its terms, into a mortgage, should have been submitted to the jury, and the court should have charged as requested. (*Munzo v. Wilson*, 111 N. Y. 295 ; *Sipple v. State*, 99 id. 287 ; *Wohlfahrt v. Beckert*, 92 id. 490 ; *Gildersleeve v. Landon*, 73 id. 609 ; *Kavanagh v. Wilson*, 70 id. 177 ; *Elwood v. W. U. T. Co.*, 45 N. Y. 553.)

It is further contended on the part of the defendant that this action is in its nature, one to recover damages for an injury to possession, and that even if the plaintiff had the legal title, and was in receipt of the rents, yet, as he was not in the actual occupancy of the premises he cannot maintain the action. A motion to dismiss the complaint upon the ground that the plaintiff had not made out a cause of action is entirely too general to raise such a question, and that is the only way it was attempted to be raised in the court below. Moreover there is no proof in the case that at the time of the commencement of this action, or during the period for which damages were claimed, there was any one in possession who had any estate or term under the plaintiff sufficient, under any circumstances, to enable him to maintain an action of this character.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

119	550
157	365

THE YATES COUNTY NATIONAL BANK, Respondent, v. ZENO
T. CARPENTER, Impleaded, etc., Appellant.

Under the provision of the Code of Civil Procedure (§ 1393) exempting pensions granted by the United States or a state for military or naval services from levy and sale on execution, where the receipts from a pension can be directly traced to the purchase of property necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt.

Statement of case.

Where, therefore, a pensioner who had a wife and family purchased a house and lot for a home, paying a portion of the purchase-price out of the proceeds of a pension certificate, and giving a mortgage on the premises to secure the balance, *held*, that the premises were exempt from levy and sale on execution.

Wygant v. Smith (2 Lans. 185), distinguished and limited.

It seems that where pension moneys have been embarked in business and mingled with other funds so as to be incapable of identification or separation, the pensioner loses the benefit of the exemption.

Yates County National Bank v. Carpenter (49 Hun, 40), reversed.

(Argued February 24, 1890 ; decided March 18, 1890.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made the first Tuesday of June, 1888, which reversed an order of the County Court of Yates county, releasing, discharging and setting aside a levy upon execution on certain real property of the defendant Zeno T. Carpenter.

The facts, so far as material, are stated in the opinion.

Arthur C. Smith for appellant. The home bought by the pensioner with his pension money is exempt from levy and sale under an execution. (Code Civ. Pro. § 1363; *Stockwell v. Nat. Bank*, 36 Hun, 583; *Burgett v. Fancher*, 35 id. 647; *Tillotson v. Wolcott*, 48 N. Y. 188; *Whiting v. Barrett*, 7 Lans. 106.)

William T. Morris for respondent. The exemption of property from liability for the payment of debts is a creature of the statute. *Prima facie* all property of a person against whom an execution has been issued may be levied on and sold, and the burden is upon the person claiming exemption to bring himself and property within the exception of the statute. (*Baker v. Brintnall*, 52 Barb. 188.) The Revised Statutes of the United States protects pensions only in the course of transmission. (U. S. R. S. § 4747; *Stockwell v. Nat. Bank*, 36 Hun, 584; *Burgett v. Fancher*, 35 id. 650.) Where the language of a statute is explicit, the courts are bound to seek for it in the words of the act, and are not at liberty to sup-

Opinion of the Court, per. RUGER, Ch. J.

pose that it intends anything different from what the language imports. (Sedg. on Const. & Stat. Law, 380, 382, 383.) The exemption of pensions from levy under an execution does not apply or extend to property not exempt from levy and sale purchased with pension money. (*Wygant v. Smith*, 2 Lans. 185; *Youmans v. Boonhaver*, 3 T. & C. 24; *Burgett v. Funcher*, 35 Hun, 650.)

RUGER, Ch. J. In March, 1882, the Yates County National Bank recovered a judgment in Justice's Court against Zeno T. Carpenter and others, for about \$111, and caused a transcript thereof to be filed in the county clerk's office, July 17, 1884. In June, 1884, the United States government issued and delivered an invalid pension certificate to Zeno T. Carpenter, as a soldier in the United States army, which was deposited by him in the First National Bank of Yates county, for collection, in July, 1884. In October, 1884, Carpenter purchased and took a conveyance of a dwelling-house and lot in the village of Penn Yan, his place of residence, from one Hurford, for \$1,300, paying the sum of \$700 cash upon the purchase-price, and securing the balance by a mortgage to the grantor upon said lot. The cash payment was made from moneys received by him from the First National Bank, as part of the collection of his pension certificate. Carpenter was a married man, having a wife and five infant children, and the house and lot were purchased for the purpose of securing a home for himself and family. He had no other means, or property, liable for the payment of debts. In February, 1885, the Yates County National Bank caused an execution upon such judgment to be issued and levied upon said house and lot, and advertised the interest of said Carpenter therein for sale at public auction to satisfy said execution.

Upon proof of these facts Carpenter moved the County Court for an order setting aside the levy and enjoining the plaintiff from taking any proceedings to enforce said execution by the sale of said real estate, upon the ground that such property was exempt from levy and sale upon execution.

Opinion of the Court, per RUGER, Ch. J.

That court granted the order asked for ; but, upon appeal to the General Term, this order was reversed and such motion was denied. The defendant, Carpenter, appeals to this court from the order of reversal.

At the time of the levy, the only interest Carpenter had in such real estate was an equity of redemption, which we must assume, on the facts in this case, did not exceed in value the sum paid for it, and it, therefore, represents, to the extent of his interest, the proceeds of his pension. Was this interest liable to levy and sale on execution? The plaintiff insists that it is, and such is the judgment of the court below. The question presented involves the construction of section 1393 of the Code of Civil Procedure, which, so far as the matter here concerned is affected, reads as follows: "A pension heretofore or hereafter granted by the United States * * * for military * * * services * * * is also exempt from levy and sale by virtue of an execution, and from seizure for non-payment of taxes, or in any other legal proceeding." That statutes of this character are to be liberally construed, with the view of promoting the objects of the legislation, is established by a uniform course of authority ; and that their force and effect are not to be confined to the literal terms of the act, has also been held in numerous cases. In *Hudson v. Plets* (11 Paige, 180), it was held that a creditor's bill would not reach the right of action of a judgment debtor for the conversion of exempt property. In *Andrews v. Rowan* (28 How. Pr. 126), it was held that a receiver of the property of a debtor, appointed in supplementary proceedings, did not take a claim or a judgment thereon, for damages accruing to such debtor from one who had wrongfully taken and sold his exempt property on execution for debt. Justice GROVER, writing the opinion of the Supreme Court in that case, says: "If the judgment rendered for the injury may be acquired by a judgment creditor, by proceedings supplemental to execution, there would be nothing to prevent seizing exempt property, selling it upon execution, and, when the debtor had sued and recovered a judgment therefor, compelling the application

Opinion of the Court, per RUGER, Ch. J.

of such judgment to the payment of the debt for which the property was seized, thus entirely depriving the debtor of the exemption, and enabling the creditor, in this way, to collect his debt from property that the law has declared not liable for its payment." The only case in this court bearing upon the subject is that of *Tillotson v. Wolcott* (48 N. Y. 188), where it was held that the exemption of a team, provided for a householder, should also apply to a judgment recovered by such householder against one who had tortiously taken and converted it to his own use. It was said by the court that "the judgment, when recovered by the debtor for the wrongful invasion of his privilege of the exemption of his property from levy and sale, represents the property for the value of which it was recovered." While the language of the statute did not, in terms, cover a judgment, it was held that it came within its spirit and could not be taken by creditors. The opinion of Justice GROVER in *Andrews v. Rowan* (28 How. Pr. 126) is referred to and approved in the opinion of Judge LEONARD.

The general exemption laws of the state provide for the protection of specific articles or classes of property with a view of alleviating the condition of the poor by securing to them the use or consumption of the property exempted; but the present law has departed from the ordinary form of exemption, and, while seeking to accomplish the same object, provides, in terms, for the exemption of money or its equivalent. It is quite obvious that such an exemption can produce no beneficial effect, unless it is extended beyond the letter of the act, and given life and force, according to its evident spirit and meaning. Like other statutes, the section in question must be construed according to the meaning and intent of the law-makers, and so as to effectuate their intention, so far as the language of the act will permit it to be done. Did the legislature intend to limit the force of their exemption to a pension, so long only as it remained an obligation of the government, or consisted of cash in the hands of the pensioner; or did they also intend to protect it after it had been expended in the pur-

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Opinion of the Court, per RUGER, Ch. J.

chase of articles of property designed to administer to the comfort and support of such pensioner and his family? If the latter was not intended, we must ascribe to the law-makers the absurd intention of granting pensions for the purpose of satisfying claims against pensioners, and not to provide for the care and comfort of invalid or aged soldiers. If the soldier is not protected in the act of exchanging his pension for the necessities of life, its only effect would be to enable his creditors to take it in satisfaction of their claims. No benefit is conferred if the protection is not extended beyond the possession of the money itself, for its only value consists in its purchasing power, and if the soldier is deprived of that, the pension might as well, so far as he is concerned, have remained ungranted. The plain purpose of the act was to promote the comfort of the soldier; to secure to him the bounty of the government, free from the claims of creditors, and to insure him and his family a safe, although modest maintenance, so long as their needs required it. In the case of an exemption of specific articles from levy and sale upon execution, it seems to be well settled that it extends not only to the protection of such articles while in use or possession, but also to any claim arising out of their conversion by a wrong doer, or their destruction by fire, or otherwise, when insured. (Freeman on Executions, § 235.) The rule seems to be just and reasonable, and within the spirit of the exemption. In the case of the exemption of money, or its equivalent, there has been some controversy in the courts with reference to the extent to which the exemption shall be carried. In such case it is somewhat difficult to lay down a rule in precise terms, by which it may be determined in all cases, what property is liable, and what exempt from levy and seizure upon legal process for the payment of debts; but we entertain no doubt that where the receipts from a pension can be directly traced to the purchase of property, necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt under the provisions of this statute. Where such moneys can be clearly identified and are used in the purchase of necessary articles,

Opinion of the Court, per RUGER, Ch. J.

or are loaned or invested for purposes of increase or safety, in such form as to secure their available use for the benefit of the pensioner in time of need, we do not doubt but that they come within the meaning of the statute; but where they have been embarked in trade, commerce, or speculation, and become mingled with other funds so as to be incapable of identification, or separation, we do not doubt but that the pensioner loses the benefit of the statutory exemption. These propositions, we think, are fully supported by the cases in this and other states. (See Freeman on Executions, § 235, tit. "Proceeds of Exempt Property.")

In *Burgett v. Fancher* (35 Hun, 647) and *Stockwell v. Bk. of Malone* (36 Hun, 583), it was held that moneys received from a pension and deposited in a bank in the name of the pensioner, were not subject to proceedings on the part of creditors to have them applied in payment of debts, although the relations between the depositor and the bank were those of creditor and debtor. The debt represented the pension, and that was exempted by the statute. The case of *Wygant v. Smith* (2 Lans. 185), when limited, as it must be, to the facts appearing in the case, is not an authority for the plaintiff here. In that case the pensioner had embarked his pension in business or trade, and in some transactions had made a profit. It was impossible to identify the fund in the various articles of property in which, through numerous and successive changes, it had become invested, and it was held that the pensioner had lost his right of exemption.

The order of the General Term should be reversed, and that of the County Court affirmed, with costs to defendant in all courts.

All concur.

Ordered accordingly.

THE PEOPLE ex rel. NATHAN B. WARREN et al., Respondents,
v. EDWARD CARTER et al., Appellants.

Where, in proceedings under the act of 1880 (Chap. 269, Laws of 1880) to reduce an assessment on real estate for the year 1887, it appeared that in 1885 and 1886, the assessors had assessed the land at the same sum, that in similar proceedings in each of those years, there had been a judicial determination fixing the actual value, and that the prior assessment had been reduced to the sum so fixed. *Held*, that in the absence of evidence of an increase of value or of some change affecting the assessable value, the doctrine of *res adjudicata* applied, and the former adjudications were binding and conclusive.

After the writ of certiorari was issued, the assessment-roll having been placed in the hands of the proper officer for collection, the relators paid the taxes imposed upon the property, leaving, however, with the officer a writing, stating that the taxes were paid under protest, for the reason that the assessment was excessive, and that for the correction thereof proceedings were then pending. *Held*, that in the absence of any evidence as to the circumstances under which the payment was made, the presumption was, that the payment was involuntary, and so, did not estop the relators.

It seems, where one pays, under protest, taxes based upon an assessment, not void, but simply excessive, and gives notice of his intention to review and correct the same in proceedings then pending for that purpose, and that he intends to reserve, not to waive or abandon, his proceedings, such a payment may not be set up as a bar to the further prosecution of the proceedings.

(Argued March 10, 1890; decided March 18, 1890.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made September 10, 1889, which affirmed a judgment in favor of the relators entered upon a decision of the court on trial at Special Term.

This was a proceeding, by certiorari, under the act, chapter 269, Laws of 1880, to review an assessment.

The material facts are stated in the opinion.

R. A. Parmenter for appellants. It is now perfectly well settled that chapter 269, Laws of 1880, "giving a remedy by certiorari to review and correct an illegal or excessive assess-

Opinion of the Court, per EARL, J.

ment," does not permit a party complaining of an assessment who has omitted to avail himself of the opportunity provided by statute to remedy his grievance, after the assessment has been confirmed by a lapse of time, to arrest the collection of the tax by a proceeding under said act. (*People ex rel. v. Comrs., etc.*, 99 N. Y. 254, 257; *People ex rel. v. Bd. of Assrs.*, 45 Hun, 243; *People v. W. S. Bank*, 39 id. 524, 530; *Fiero on Spec. Proc.* 150; 1 R. S. [Edm. ed.] 365, 366, §§ 19, 20; 3 id. 350.) The voluntary payment by the relators of the tax against the property known as "River View," was a waiver on their part of the right to prosecute this writ of certiorari. (*Bruecher v. Port Chester*, 101 N. Y. 240, 244.) The decision of the court below reducing the valuation of the "River View" property is not *res adjudicata* as to the assessors acting as sworn public officers for the year 1887, they being required to verify their official acts by their personal oaths. (*Stowell v. Chamberlain*, 60 N. Y. 272; *Smith v. Smith*, 79 id. 634.)

G. B. Wellington for respondents. This court, in these proceedings, cannot review disputed questions of fact. (*People ex rel. v. Hicks*, 105 N. Y. 200.)

EARL, J. This proceeding was instituted by the relators under chapter 269 of the Laws of 1880, to review an assessment made by the assessors of the city of Troy for the year 1887 upon their property in that city known as "River View," which had been assessed at \$60,500. The assessors had in each of the years 1885 and 1886 assessed the property at the same sum, and by proceedings instituted in each of those years, under the same act, the relators had procured a judicial determination that the actual value of the property is \$40,000, and that the assessment should be reduced to that sum. That adjudication was binding upon these defendants. In the year 1887 the assessors professed to act upon the statutory rule of assessing all real estate in the city at its actual value, and they had no right to assess the property in question at any greater value than \$40,000 unless it was worth more.

Opinion of the Court, per EARL, J.

Upon the trial of this matter the relator produced the records in the prior proceedings, and then gave evidence tending to show that there had been no change in the value of the property, and that it was not worth to exceed \$40,000. The defendants gave evidence controverting the value claimed by the relators, and tending to show that the property was worth the sum of \$60,500. The court at Special Term found that the actual value of the property was but \$40,000.

The adjudications made in 1885 and 1886 were binding and conclusive upon the parties thereto as to the value of the property in those years, and unless there was an increase in its value subsequent to those adjudications and before the assessment in 1887, or some change affecting its assessable value, the court at Special Term committed no error in giving those adjudications conclusive effect between the parties. The fact that some of the assessors had received new terms of office was unimportant. The offices and the officers were the same, and we see no reason to doubt that the doctrine of *res adjudicata* should apply to such a case so far as above indicated.

The objection is made that the relators did not appear before the assessors on what is called the "grievance" day and asked to have the assessment corrected; but they allege in their petition that they did appear before the assessors on that day, and requested that the assessment be reduced to \$40,000, as determined by the previous adjudications, and that the assessors refused to reduce the same; and this allegation in the petition is not denied or put in issue by the return, and must, therefore, be taken as admitted.

After the writ of certiorari was issued and the proceedings were thus pending, and after the assessment-roll as amended and corrected had been placed in the hands of the city chamberlain for collection, on the 15th of October, 1887, the relators paid the taxes imposed upon the property in question. But at the time of such payment they served upon the chamberlain, and left with him, a written protest stating that the taxes were paid under protest, "for the reason that the assess-

ment against said pieces of property are illegal, excessive and unequal, for the correction of which proceedings are now pending in the Supreme Court." The evidence does not disclose how the relators came at that time to make the payment. We cannot assume, in the absence of any proof, that the payment was voluntary; but we may assume that it was under the stress of some compulsion, and that thus it was involuntary within the meaning of *Bruecher v. Village of Port Chester* (101 N. Y. 240). Where, however, one pays taxes imposed under an assessment which is not void, but simply excessive, and unequal, and gives notice of his proceedings to review and correct the same, thus indicating that he intends to reserve his rights and does not intend to waive or abandon his proceedings, we know of no principle of law upon which such a payment under protest can be set up as a bar to the further prosecution of the proceedings. By such payment he waives no rights, and he does no wrong and creates no embarrassment to the municipality or officer taking his money, and he cannot be estopped thereby. Section 2 of the act, chapter 269, provides that the writ of certiorari allowed under that act shall not stay the proceedings of the public officers connected with the assessment or collection of the taxes; and hence, it would be extremely unjust to hold that in case the tax, which can be enforced against the tax-payer, shall be paid, he shall lose his remedy under the act.

In section 8 of the act, it is provided that in case the assessment shall be reduced by judgment in the proceedings, "then there shall be audited and allowed to the petitioner and included in the next year's tax levy of said town, village or city, and paid to the petitioner the amount, with interest thereon, from the date of payment, in excess of what the tax should have been as determined by such judgment or order of the court." The judgment in this proceeding provides that the assessment shall be reduced to \$40,000, and that there should be audited and allowed to the relators the amount of taxes paid upon the erroneous assessment, with interest from the date of payment; and that judgment is in strict con-

Statement of case.

formity with the statute, and is not subject to any just complaint.

We are, therefore, of opinion that the judgment should be affirmed with costs.

All concur, except RUGER, Ch. J., dissenting.

Judgment affirmed.

FRANCIS M. TAYLOR, Respondent, v. THE BROOKLYN ELEVATED
RAILROAD COMPANY, Appellant.

Under the provision of the Code of Civil Procedure in reference to tender (§ 731) and payment into court of the money tendered, in case of refusal to accept (§ 732), when the money is so brought into court, it belongs to plaintiff, and his title thereto cannot be disputed, whatever may be the result of the action.

The plaintiff, in proceeding after a tender and deposit, simply runs the risk of paying defendant's costs, if the recovery falls short of the amount tendered, while the defendant takes the risk of losing the amount tendered, in the event of his succeeding in the action.

(Argued March. 4, 1890; decided March, 18, 1890.)

APPEAL from order of the General Term of the City Court of Brooklyn made November 25, 1889, which affirmed an order of Special Term directing payment to plaintiff of an amount deposited with the court in this action.

This action was brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. The trial resulted in a verdict for defendant.

The facts, so far as material to the questions discussed, are stated in the opinion.

Before the trial of this action the defendant, upon an affidavit of a previous tender on its behalf in full liquidation of plaintiff's claim and to cover costs to date, obtained an order granting to it leave "to bring into court and deposit with the clerk thereof, the sum of \$200, admitted by it to be due, the plaintiff herein, together with \$65, costs to date." The order also pro-

Statement of case.

vided: "(2) That thereupon unless the plaintiff shall accept the sum in full discharge of this action, the same shall be deducted from any recovery thereon, and the same shall be paid out of court to the plaintiff or her attorneys; that on the trial of the issues joined herein said plaintiff shall not be permitted to give evidence that any such tender has been made." Upon the trial the jury rendered a verdict for the defendant. Thereafter the court ordered the payment of the deposit to the plaintiff.

Wm. N. Cohen for appellant. This appeal is properly before the court. (*People v. N. Y. C. R. R. Co.*, 29 N. Y. 418, 422; *Tracy v. F. N. Bank*, 37 id. 523; *O., etc., R. R. Co. v. V., etc., R. R. Co.*, 63 id. 176; *Conaughty v. S. Bank*, 92 id. 401; *Bergen v. Carmen*, 79 id. 146; *McGregor v. Comstock*, 19 id. 581; *Sturgis v. Spofford*, 58 id. 103; *Marvin v. Marvin*, 78 id. 541; *Hobart v. Hobart*, 86 id. 636; *Witkowski v. Paramore*, 93 id. 467.) The tender herein was not a payment on account, but a mere offer to buy peace, so that a verdict for defendant entitles it to repayment of its deposit. (*Dunning v. Humphrey*, 24 Wend. 31; *Johnston v. C. Ins. Co.*, 7 Johns. 315, 318; Tidd's Pr. 363; Rumsey's Pr. 616, 617; *Wilson v. Doran*, 110 N. Y. 101; *Berdan v. Greenwood*, L. R. [3 Ex. Div.] 251, 260; *Hawkesley v. Bradshaw*, Id. [5 Q. B. Div.] 302, 305.) In order to make the tender effectual for any purpose, it was the duty of the defendants to pay the money into court, and allege that fact in their answer. (Graham's Pr. 249, 541; Tidd's Pr. 669; *Brown v. Ferguson*, 2 Den. 196; *Sheridan v. Smith*, 2 Hill, 538; *Simpson v. French*, 25 How. Pr. 464; *Becker v. Boon*, 61 N. Y. 317, 321; 3 R. S. [6th ed.] 861, § 22.) Assuming, however, that the tender had been pleaded, still the plaintiff is not entitled to the tender in case of an "involuntary injury," when in the progress of the trial there be found an insuperable obstacle to recovery. In such case the plaintiff's right, if any ever existed, to the money on deposit, lapses. (*Breunich v. Weselman*, 17 J. & S. 31; 100 N. Y. 609.)

Opinion of the Court, per GRAY, J.

James D. Bell for respondent. A party bringing money into court, pursuant to direction of the court, is discharged thereby from all further liability to the extent of the money so paid in. (*Williamson v. Henley*, 6 Bing. 299.) All the cases in which it has been held that the tender was a "nullity" for want of pleading it, are cases where the tender was made before suit brought, or at least before issue was joined, and where the defendant insisted upon his tender being good to defeat the plaintiff's claim at least *pro tanto*, or to prevent his recovering costs. (*Becker v. Boon*, 61 N. Y. 317; Code Civ. Pro. § 734; 3 Black. Comm. 304; Graham's Pr. 544.) Payment into court is a payment *pro tanto*. (*Murray v. Bethune*, 1 Wend. 191; *Spaulding v. Vandercook*, 2 id. 431; *Johnston v. C. Ins. Co.*, 7 Johns. 315; *Slack v. Brown*, 13 Wend. 390; *Kelly v. West*, 2 J. & S. 304; *Wilson v. Doran*, 39 Hun, 88; 110 N. Y. 101; *Eaton v. Wells*, 82 id. 576; *Doran v. Wilson*, 110 id. 101; *Rockefeller v. Weidervax*, 3 How. Pr. 382; 1 Burrill's Pr. 408, 409.) The English cases and authorities are to the same effect. They go so far as to say that the defendant pays into court at his peril, and that even if he has paid in by mistake, he shall not have his money back. (3 Black. Comm. 304; *Vaughan v. Barnes*, 2 Bos. & Pul. 392; *Crockay v. Martin*, Barnes. 281; *Meager v. Smith*, 3 Barn. & Ald. 673, 680; *Le Grew v. Cooke*, 1 Bos. & Pul. 332, 333; *Malcolm v. Fullarton*, 2 T. & C. 645, 648; *Scherger v. Carden*, 11 C. B. 850; *Story v. Finnis*, 6 Exch. 123; *Perrin v. M. R. Co.*, 11 C. B. 855.)

GRAY, J. We think the order was right. The moneys belonged to the plaintiff from the moment of their deposit, by force of their payment into court under this order. The provisions of the Code permit this procedure by a defendant, in all actions brought for the recovery either of a sum certain, or of damages for a casual, or involuntary, personal injury. They provide for the tender of such a sum of money, as the defendant conceives to be sufficient to make amends for the injury, together with the costs to date. The appellant's

Opinion of the Court, per GRAY, J.

counsel contends, however, for a distinction between a tender of amends, as he insists this was, and an ordinary tender at common law, or under the Revised Statutes. He says that the former implies no concession of liability, but is an offer to buy peace, and hence, if not accepted by the plaintiff, does not belong to him, if the verdict goes adversely to his claim. The distinction, however, is not recognized and it does not exist under our system of procedure.

The Code provides for two courses which may be pursued by the defendant, after suit brought. He may make a tender of a certain sum and, if it is refused, he may deposit it in court; or he may offer to allow judgment to be taken against him for a certain sum with costs. If the former course is pursued, its meaning and result are plain. A tender is not effectual under the Code "unless the money is accepted, or is paid into court." If it is not accepted, in lieu of the acceptance and in order to make his tender available in law, the defendant may deposit the amount in court. The payment into the court is then deemed equivalent to an acceptance by the plaintiff of the amount tendered. The money deposited is deemed in law a payment to the plaintiff on account of the contract obligation, or of a conceded liability for the injury. The provisions of the Code in question, however, are similar to those which existed previously in the Revised Statutes; except that the additional requirement has been made, that the moneys should be paid into the court and notice thereof given concerning them. It was held in *Slack v. Brown* (13 Wend. 390), and in *Dakin v. Dunning* (7 Hill, 30), that when the money was brought into court it belonged to the plaintiff in any event. In the more recent cases of *Becker v. Boon* (61 N. Y. 317) and *Wilson v. Doran* (110 id. 101), Judge EARL delivering the opinion in the former and Judge ANDREWS in the latter case, it was assumed by them that moneys paid into court by a defendant, under a tender, became the property of the plaintiff in all events and that his title to them cannot be disputed. The Revised Statutes and the Code have extended the common-law right of tender, so

Statement of case.

as to permit a tender of moneys, or their payment into court where the tender is refused, during the pendency of an action. But the effect under the statutes, as now under the Code, has always been considered to be that the plaintiff recovers in any event the amount of the tender. Judge BRADLEY, at General Term, in the case of *Wilson v. Doran* (39 Hun, 90), collected the authorities in the English reports and in this state, and has there reviewed them.

The plaintiff runs the risk, in proceeding after a tender or deposit, of paying defendant's costs, if the recovery falls short of the amount tendered; while the defendant, in such a case, runs the risk of losing that amount of moneys in the event of his success upon the ensuing trial.

When the moneys are brought into court they become the plaintiff's and it is immaterial, as to the question of their ownership, what the result of the trial may be. This result is a just one. The defendant had two courses available to it, under the Code which regulates the procedure in civil actions. It elected to take that one which involved the tender, or payment of money to the plaintiff and paid the money into court upon the refusal of its tender, under admission of liability *pro tanto*, and to make sure that the plaintiff could not say that she had not been paid so much, in any event.

The order appealed from should be affirmed with costs.

All concur.

Order affirmed.

ELIJAH R. SCHOONMAKER, Appellant and Respondent, v.
FRANK W. BONNIE et al., Respondents and Appellants.

119	565
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In an action for specific performance of a contract for the sale of land, it appeared that the contract was executed by defendants F. and R., in whom was the title. Their wives were also made defendants. They all joined in the answer, which recites, "defendants further admit that they did promise to convey the said premises to the plaintiff," and the only issue tendered therein or litigated was that the contract in suit was induced by the fraudulent representations of plaintiff. There was no allegation that the wives were not parties to the contract, or were not

Statement of case.

bound thereby. The issue of fraud was decided against defendants, and the judgment required their wives to join with their husbands in the conveyance directed. The defendants jointly excepted to the findings of facts and law, but none of the exceptions were directed toward said provision of the judgment. The General Term reversed that part of the judgment on the ground that the wives were not parties to the contract. *Held*, that as there was no special exception pointing out the objection, the reversal by the General Term was error.

It seems that had the objection been raised on the trial, and presented by a proper exception, it would have been valid.

As to whether the court has power to specifically enforce a contract by a married woman to release her dower interest, made upon a consideration passing to her husband, when they were residents of, and the contract was made in another state, in which the common-law disabilities of married women still exists, *quære*.

Where a reversal of a judgment by the General Term is upon the law, not the facts, to sustain the reversal here, it must appear that some exception was taken on the trial raising a question of law, and that such question was erroneously decided.

A judgment will not be reversed as to one of several parties appellant although to him erroneous in law, upon a general exception by all, in the absence of a special exception pointing out the error in the particular case.

(Argued March 11, 1890; decided March 18, 1890.)

CROSS APPEALS from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1887, which reversed in part a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Wm. H. Henderson for appellant. In overruling the defendants' motion for a nonsuit the referee did not err. (*Bommer v. A. S. & H. M. Co.*, 81 N. Y. 468; *Pomeroy* on Cont. §§ 140, 141.) A party who formally and explicitly admits by his pleading that which establishes the plaintiff's right, will not be suffered to deny its existence or to prove a state of facts inconsistent with that admission. (*Paige v. Willett*, 38 N. Y. 31.) A general exception is without avail.

Opinion of the Court, per ANDREWS, J.

(*Paige v. Willett*, 38 N. Y. 28; *Newell v. Doty*, 33 id. 83; *Ward v. Craig*, 87 id. 550; *Smedis v. B. & R. B. R. Co.*, 88 id. 13.) When parties go to trial, and no question is raised by any party upon the pleadings at any stage of the case, then judgment may be given in accordance with the evidence. And it is too late after judgment to object that the pleadings did not authorize the giving of the evidence, which was received without objections, and which sustains the judgment. (*Day v. Town of New Lots*, 107 N. Y. 148; *Davis v. Leopold*, 87 id. 620; *Thompson v. Bank of B. N. A.*, 82 id. 1; *Stewart v. Morse*, 79 id. 629.)

John J. Inman for respondents. The judgment entered upon the report of the referee should have been reversed, as to all the defendants. (*Vanderbilt v. Schreyer*, 21 Hun, 537; *Beck v. Allison*, 4 Daly, 421.) The inchoate right of dower of Mrs. Frank W. and Mrs. Robert P. Bonnie in the lands in question was an actual subsisting right, possessing a pecuniary value. (*Simer v. Canaday*, 53 N. Y. 298; *Witthaus v. Schack*, 24 Hun, 332; *Daly v. Baker*, 12 id. 222; *Steele v. Ward*, 30 id. 555.)

ANDREWS, J. The General Term reversed that part of the judgment entered upon the report of the referee which required the defendants Mrs. Frank W. Bonnie and Mrs. Robert P. Bonnie, the wives of the other defendants, to join with their husbands in the conveyance to the plaintiff, on the ground that they were not parties to the contract for the sale of the land, for the specific performance of which the action was brought. This ruling of the General Term presents the main question in the case.

If the point upon which the General Term proceeded had been raised on the trial and presented by a proper exception, we perceive no ground for questioning its conclusion.

The defendants Frank W. Bonnie and Robert P. Bonnie had title to the land embraced in the contract. Their wives had simply an inchoate right of dower therein. The contract,

Opinion of the Court, per ANDREWS, J.

as the complaint shows, was made by the husbands, and to it their wives were not parties. The admission in the answer, viz.: "Defendants further admit that they did promise to convey the said premises to the plaintiff," although equivocal and misleading, taken in connection with the allegation in the complaint, may, we think, be construed as an admission simply of the contract alleged by the plaintiff.

The referee, in his report, finds that the contract was entered into between the plaintiff and the two male defendants. The judgment, however, requires the wives to join in the conveyance directed, as if they had contracted with their husbands to convey to the plaintiff, of which there is no evidence. Even if they had been parties to the contract, a very serious question would arise as to the power of the court to specifically enforce as against them, a contract to release their dower interest upon a consideration passing to their husbands, and especially as the contract was made in another state by residents there, wherein the common-law disabilities of married women, so far as appears, still exist.

The reversal in this case was upon the law and not upon the facts, and, to affirm the judgment of reversal, it must appear that some exception was taken on the trial raising a question of law, and that such question was erroneously decided. The point upon which the General Term decided the case was not raised in any form on the trial, and is evidently an after thought. The defendants united in their answer, and the only issue tendered therein was that the contract in question was induced by the fraudulent representations of the plaintiff. There was no allegation that the *femmes covert* were not parties to the contract, or were not bound thereby. The trial proceeded upon the assumption that all the defendants stood in the same situation in respect of their liability. The issue of fraud was the only issue litigated, and was the issue upon which the case was decided. There was no finding and no request to find upon the point now presented. If this point had been raised the plaintiff would have been in a position to demand damages against the other defendants on the ground

Statement of case.

of the imperfection of their title. The defendants jointly excepted to the finding of facts and law in the report of the referee. But none of the exceptions were directed to the point now made, that the contract did not bind the female defendants. We have recently decided that a judgment will not be reversed as to one of several parties appellants, although as to him erroneous in law, upon a general exception by all, in the absence of a special exception pointing out the error in the particular case. (*Murray v. Usher*, 117 N. Y. 542.) The reversal by the General Term cannot, we think, be sustained, and it is a satisfaction to know that but a small pecuniary interest is involved in our decision. The appeal by the defendants Frank W. and Robert P. Bonnie is destitute of merit.

The result is that the judgment of the General Term should be reversed as to the appeal of the plaintiff, and affirmed as to the appeal of the defendants Frank W. and Robert P. Bonnie. This restores the judgment entered on the report of the referee. The plaintiff should also have costs of one appeal in all courts against the male defendants.

All concur.

Judgment accordingly.

THE PEOPLE ex rel. WILLIAM KEMMLER, Appellant, v. CHARLES F. DURSTON, Agent and Warden of Auburn Prison, Respondent.

The provisions of the Code of Criminal Procedure (§§ 491, 492, 503, 504, 505, 506, 507, 508 and 509, as amended by chap. 489, Laws of 1888) changing the mode of inflicting the death penalty do not upon their face, nor in their general purpose and intent, violate any provision of the Constitution.

It seems, that under the provision of the state Constitution (Art. 1, § 5) forbidding the infliction of cruel and unusual punishments, the courts have power to declare void any legislative acts prescribing punishment for crime in fact cruel and unusual.

The legislature, however, has power to change the manner of inflicting the death penalty; this is not a change of punishment, but simply of the mode.

119	569
119	586
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Statement of case.

Whether the use of electricity as an agency for producing death constituted a more humane method of execution than that formally used was a question for the legislature, and its determination in regard thereto is conclusive.

The courts have no power to take proof as to the constitutionality of a statute, and extraneous testimony either of experts or other witnesses is not admissible to show that, in carrying it out, some provision of the Constitution may be violated. If it cannot be made to appear that the statute is unconstitutional by argument deduced from the language of the law itself, or from matter of which the court can take judicial notice, it must stand.

Upon a return to a writ of habeas corpus where it is shown that the relator has been sentenced and is detained under the process of a court of competent jurisdiction, it is the duty of the court to remand him unless it be shown that the trial court was without jurisdiction to pass the sentence. Reported below, 55 Hun, 64.

(Argued February 25, 1890 ; decided March 21, 1890.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 1, 1889, affirming an order of the county judge of Cayuga county, dismissing a writ of habeas corpus sued out by relator and remanding him to the custody of defendant.

The facts, so far as material, are set forth in the opinion.

W. Burke Cochran for appellant. The constitutional inhibition against cruel and unusual punishments renders any law passed by the legislature in violation of its provisions, unconstitutional and void. (3 Hallam's Const. History ; Smollett's History of England, chap. 1 ; *Wilkeson v. Utah*, 9 Otto, 130 ; 4 Black. Comm. 11 ; *People v. Felton*, 3 Howell's State Trials, 370 ; *Countess of Shrewsbury's Case*, 2 id. 674 ; 3 Jefferson's Works, 4, 201 ; *People v. Allin*, 42 N. Y. 378.) It being conceded that the infliction of the penalty will expose the relator to the risk of torture, the sentence is in violation of the Constitution, and, therefore, void. (*People v. Hartung*, 22 N. Y. 166 ; *Stewart v. Palmer*, 74 id. 188.) The act is unconstitutional, because upon its face it provides for the infliction of an unusual penalty. (Hume's History of England, chap. 71 ; Burnett's History of His Own Times, 803, 812, 852 [Onslow's note] ; Macaulay's History of England, chap. 10 ;

Statement of case.

10 Lingard's History of England, chap. 4; Lords & Com. Journal, Feb. 6, 1689; 4 Black. Comm. 327; 25 Edward, 111, chap. 2; 1 Edward VI. chap. 12; 1 Phillip & Mary, chap. 1, 10; 13 Eliz. chap. 2; Westminster, 1; 3 Edward I. chap. 9; 8 Henry VI. chap. 12; 21 Jac. 1, chap. 6; 5 Eliz. chap. 9; 11 Henry IV. 5 Henry IV. chap. 5, 22 & 23 Car. 11, chap. 1, Westminster, 1; 3 Edward I. chap. 13; Westminster, 2; 13 Edward I. chap. 34; 18 Eliz. chap. 7; 8 Henry VI. chap. 6; 21 Henry VIII. chap. 1; 2 Edward VI. chap. 12; 4 & 5 Phillip & Mary, chap. 4; 1 Edward VI. chap. 12; 18 Eliz. chap. 7; 9 Henry, 1; 1 Edward VI. chap. 12; 2 & 3 Edward VI. chap. 33; 31 Eliz. chap. 12; 18 Edward VI. chap. 3; 23 Henry VIII. chap. 1; 5 Eliz. chap. 14; Hume's History of England, chap. 4, appendix 1; *Felton's Case*, 3 State Trials, 370; Smollett's History of England, chap. 1.)

Charles F. Tabor, attorney-general, for respondent. The constitutional prohibition against the infliction of cruel and unusual punishment must be ineffectual, being a prohibition upon the judicial power, the exercise of authority by courts of criminal jurisdiction, and not, in any sense, a restriction upon legislative power. (Stat. of Wm. & Mary, chap. 2, §§ 9, 10, 11, 12; 1 Macaulay, 487, 488, 497, 569, 643, 649, 650, 651, 664; 2 State Tr. 375, 447, 450, 474, 483, 878, 1315, 1356; 4 Black. Comm. 440.) The bill of rights did not change the law; it only declared what the law of England, as to the rights of the subject, was. (May's Law of Parliament, 5; *Done v. People*, 5 Park. Crim. Rep. 364, 383; *Jackson v. Wood*, 2 Cow. 819; *Barker v. People*, 3 id. 686, 701; *Barron v. Baltimore*, 7 Pet. 243; *Pervear v. Commonwealth*, 5 Wall. 475, 480; U. S. Const. art. 2, § 8; id. art. 3, § 3; id. art. 1, § 8; N. Y. Conv. 1821, 49, 87, 94; id. 1846 [Atlas ed.] 196, 1062.) The courts and text-writers have adopted the view of the Constitutional prohibition above contended for. (*In re Bayard*, 25 Hun, 546; *Wilkinson v. Utah*, 99 U. S. 130, 135, 136; Story on Const. Lim. 328, 329; 2 id. § 1930.) Even if the language of the fifth subdivision

Statement of case.

of section 1 of article 1 of the state Constitution should be construed as applicable to the legislative power, it is to be regarded only as a maxim, the interpretation of which rests with the legislature alone. (*In re Bayard*, 25 Hun, 546; *Commonwealth v. Hitchings*, 5 Gray, 482, 486; Story on Const. Lim. § 1342; *Martin v. Mott*, 12 Wheat. 19; Tiedman on Police Power, §§ 10–12; *Powell v. Pennsylvania*, 127 U. S. 686; *People v. Arensburg*, 103 N. Y. 399; *People v. Gillson*, 109 id. 389; *Embury v. Connor*, 3 id. 511, 517; *Taylor v. Porter*, 4 Hill, 140; *Campbell v. Evans*, 45 N. Y. 356; *Rockwell v. Nearing*, 35 id. 302–308; *In re McMahon*, 102 id. 176, 187; 31 id. 574, 584.) Every presumption is in favor of the validity of legislative acts, and they are to be upheld unless there is a substantial departure from the organic law. (*Board of Excise v. Barrie*, 34 N. Y. 666, 668; *People ex rel. v. Briggs*, 59 id. 553, 558; *People v. H. Ins. Co.* 92 id. 328, 344; *Newel v. People*, 7 id. 9; *People ex rel. v. Albertson*, 55 id. 50, 54; *In re E. R. R. Co.*, 70 id. 327, 432; *People v. Gillson*, 109 id. 389, 397; *People v. King*, 110 id. 418; *People ex rel. v. D'Oench*, 111 id. 359; *People v. Budd*, 117 id. 1; *Ogden v. Saunders*, 12 Wheat. 270.) The act is constitutional upon its face. (*People v. Super.*, 43 N. Y. 130; *H. I. Co. v. Alger*, 54 id. 175; *People v. N. Y. & M. B. R. Co.*, 84 id. 568; *United States v. U. P. R. R. Co.*, 91 U. S. 79; *Platt v. U. P. R. R. Co.*, 99 id. 59; Laws of 1886, chap. 352; Laws of 1887, chap. 7.) Proof *aliunde* to establish the unconstitutionality of a statute is entirely incompetent. (Code Civ. Pro. §§ 2031, 2039; *Cronin v. People*, 82 N. Y. 323; *In re E. R. R. Co.*, 70 id. 327, 328, 351; *People v. Albertson*, 55 id. 50; *People v. Draper*, 15 id. 532, 545, 555; *Talbot v. Hudson*, 16 Gray, 417, 422; *Warner v. Beers*, 23 Wend. 125; *People v. Devlin*, 33 N. Y. 280; *Judson v. Plattsburgh*, 3 Dill. 181; *People v. N. Y. C. R. R. Co.*, 13 N. Y. 78; *Walker v. Haines*, 20 Wend. 555, 562; *Holmes v. Carley*, 31 N. Y. 289; *McCluskey v. Cromwell*, 11 id. 593, 601.) The only question that can be gone into on the return of the writ is as to the jurisdiction of the court that pronounced the judgment.

Opinion of the Court, per O'BRIEN, J.

People ex rel. v. Warden, 100 N. Y. 20; *People ex rel. v. Liscombe*, 60 id. 559; *People v. McLeod*, 1 Hill, 377; 3 id. 658; *People ex rel. v. Kelly*, 24 N. Y. 74.) If the method of infliction of the death penalty specified in the act of 1888 be unconstitutional, the amendments of the Code of Criminal Procedure proposed by such act, which have in view a new form of capital punishment, are absolutely void and ineffectual to change the law as it existed prior to the passage of the act of 1888, and made no change therein, and did not repeal any part thereof providing for the infliction of the death penalty. An unconstitutional statute is no law. (Cooley on Const. Lim. 3, §§ 186, 188; *Ex parte Davis*, 21 Fed. Rep. 396; *Smith v. Schilling*, 95 N. Y. 131; 36 id. 449, 451; *Harbeck v. Mayor*, 10 Bos. 366; *Sullivan v. Adams*, 3 Gray, 476; *Shepardson v. M. & B. R. R. Co.*, 6 Wis. 605, 615; *People v. Tiphane*, 13 How. Pr. 74; *People ex rel. v. Kelley*, 97 N. Y. 212, 215; *People ex rel. v. Gilbert*, 96 id. 631; *People ex rel. v. Jacobs*, 66 id. 8, 10; *People ex rel. v. Liscombe*, 60 id. 559.)

O'BRIEN, J. The respondent is the agent and warden of the state prison at Auburn, and the relator being in his custody applied for a writ of habeas corpus to inquire into the cause of detention, which was made returnable by the officer granting it before the county judge of Cayuga county. The relator in his petition for the writ stated that the cause or pretense of the imprisonment complained of was that after his indictment and trial for the crime of murder in the first degree, and his conviction thereof in the Court of Oyer and Terminer, he was sentenced by that court to undergo a cruel and unusual punishment for that crime, contrary to the Constitution of this state and of the United States, and was threatened with deprivation of life without due process of law, by reason of such illegal sentence and judgment of the court. The writ was duly served upon the respondent, who made return thereto that he detained the relator in his custody as agent and warden of the prison by virtue of the judgment of the Court of Oyer and Terminer held in the county of Erie, whereby the relator was

Opinion of the Court, per O'BRIEN, J.

duly convicted of the crime of murder in the first degree, and also by virtue of a warrant duly delivered to him under the hand and seal of a justice of the Supreme Court presiding at the said Court of Oyer and Terminer where the relator was convicted, which recited the indictment, trial, conviction and sentence of the relator, and directed the respondent to carry the same into effect in these words: "Now, therefore, you are hereby ordered, commanded and required to execute said sentence upon him, the said William Kemmler, otherwise called John Hort, upon some day within the week commencing on Monday the 24th day of June in the year of our Lord one thousand eight hundred and eighty-nine, and within the walls of Auburn state prison, or within the yard or inclosure adjoining thereto, by then and there causing to pass through the body of him, the said William Kemmler, otherwise called John Hort, a current of electricity of sufficient intensity to cause death, and that the application of such current of electricity be continued until he, the said William Kemmler, otherwise called John Hort, be dead." This command and direction to the warden was in accordance with the sentence actually passed upon the relator after conviction, in these words: "The sentence of the court is that within the week commencing on Monday the 24th day of June in the year of our Lord one thousand eight hundred and eighty-nine, and within the walls of Auburn state prison, or within the yard or inclosure adjoining thereto, the defendant suffer the punishment of death, to be inflicted by the application of electricity, as provided by the Code of Criminal Procedure of the state of New York, and that in the mean time the defendant be removed to, and until the infliction of such punishment be kept in solitary confinement in, said Auburn state prison."

On the return day of the writ the relator and the respondent appeared by counsel before the county judge, and by agreement of counsel the production of the relator, pursuant to the command of the writ, was waived. Counsel for the relator then offered to prove that the infliction of the penalty named in the sentence, namely death by the application of electricity, is a

Opinion of the Court, per O'BRIEN, J.

cruel and unusual punishment within the meaning of the Constitution, and cannot, therefore, be lawfully inflicted. The attorney-general objected, on the ground that the court had no authority to take proof in regard to the constitutionality of the statute. This objection was overruled by the county judge, and the counsel for the respective parties agreed that a referee be appointed for the purpose of taking the testimony in pursuance of the offer.

In this way a mass of testimony was given upon both sides, certified by the referee to the county judge and embraced in the extended record before us. The result was that after a hearing upon the report of the referee the county judge dismissed the writ and remanded the relator to the custody of the respondent. When it appeared, from the return of the respondent, that he retained the relator in custody under and by virtue of the judgment of a court of competent jurisdiction wherein the relator was convicted of murder, it was the duty of the county judge to dismiss the writ and remand the relator to the custody of the agent and warden of the prison, unless it could be shown that the Court of Oyer and Terminer was without jurisdiction to pass the sentence which it did. (*People ex rel. v. Warden, etc.*, 100 N. Y. 20; *People ex rel. v. Liscomb*, 60 id. 559.)

It is not denied that the court had such jurisdiction providing that the legislature had power under the Constitution to enact chapter 489 of the Laws of 1888, entitled "An act to amend sections 491, 492, 503, 504, 505, 506, 507, 508, 509 of the Code of Criminal Procedure, in relation to the infliction of the death penalty, and to provide means for the infliction of such penalty." Prior to the passage of this statute the punishment by death in every case was to be inflicted by hanging the convict by the neck until he was dead. This provision of law was changed by the amendments of the Code above referred to, and now the section (505) reads as follows: "The punishment by death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead."

Opinion of the Court, per O'BRIEN, J.

The only question involved in this appeal is whether this enactment is in conflict with the provision of the state Constitution which forbids the infliction of cruel and unusual punishment. (Const. art. 1, § 5.) This provision was borrowed from the English statute passed in the first year of the reign of William and Mary, being chapter 2 of the statutes of that year, entitled "An act declaring the rights and liberties of the subject, and settling the succession of the crown," usually known as the Bill of Rights. It enacts, among other things, that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." When this statute was made part of the Constitution of the United States, the word "shall" was substituted for the word "ought," and in this form it first appears in the Constitution of this state adopted in 1846. It is not very clear whether the provision as it stands in our Constitution was intended as an admonition to the legislature and the judiciary, or as a restraint upon legislation inflicting punishment for criminal offenses. When the statute referred to was enacted in England it was not intended as a check upon the power of parliament to prescribe such punishment for crime as it considered proper. Its enactment did not change any law then existing, nor did it mitigate the harshness of criminal punishments in that country, as is shown by the fact that for more than half a century after it appeared on the statute book, a long catalogue of offenses were punishable by death, many of which were not visited with that extreme penalty before the Bill of Rights was passed. (2 Blackstone's Comm. chap. 33, p. 440.)

The history of the times in which this provision assumed the form of a law, shows that it was, after all, intended to be little more than a declaration of the rights of the subject. The English people were about to place upon the throne, made vacant by revolution, a foreign prince, whose life had been spent in military pursuits, rather than in the study of constitutional principles and the limitations of power, as then understood in the country he was to govern. This was considered a favorable opportunity to enact, in the solemn form of

Opinion of the Court, per O'BRIEN, J.

a statute, a declaration of the principles upon which the people desired the government to be conducted; but whatever the purpose of the statute was in the country where it originated, we think that its presence in the Constitution of this state confers power upon the courts to declare void legislative acts prescribing punishments for crime, in fact cruel and unusual. This is the power that is invoked against the amendments to the Code of Criminal Procedure above referred to by the learned counsel for the relator, in an argument addressed to us, interesting on account of its great political and scientific research. We entertain no doubt in regard to the power of the legislature to change the manner of inflicting the penalty of death. The general power of the legislature over crimes, and its power to define and punish the crime of murder is not and cannot be disputed. The amendments prescribed no new punishment for the offense. The punishment now, as before, is death. The only change made is in the mode of carrying out the sentence. The infliction of the death penalty in any manner must necessarily be accompanied with what might be considered in this age, some degree of cruelty, and it is resorted to only because it is deemed necessary for the protection of society. The act on its face does not provide for any other or additional punishment.

In behalf of the relator, this legislation is assailed in no other way than by attempting to show that the new mode of carrying out a death sentence subjects the person convicted to the possible risk of torture and unnecessary pain. This argument would apply with equal force to any untried method of execution, and, when carried to its logical results, would prohibit the enforcement of the death penalty at all. Every act of the legislature must be presumed to be in harmony with the fundamental law until the contrary is clearly made to appear. (*Metropolitan Board of Excise v. Barrie*, 34 N. Y. 666, 668; *People ex rel. v. Briggs*, 50 id. 553, 558; *People v. Home Ins. Co.*, 92 id. 328, 344; *People ex rel. v. Albertson*, 55 id. 50, 54; *People v. Gillson*, 109 id. 389, 397; *People v. King*, 110 id. 418.)

Opinion of the Court, per O'BRIEN, J.

If it cannot be made to appear that a law is in conflict with the Constitution by argument deduced from the language of the law itself, or from matters of which a court can take judicial notice, then the act must stand. The testimony of expert or other witnesses is not admissible to show that in carrying out a law enacted by the legislature, some provision of the Constitution may possibly be violated. (*People v. Albertson*, *supra*; *People v. Draper*, 15 N. Y. 532; *Matter of N. Y. E. R. R. Co.*, 70 id. 327.)

If the act upon its face is not in conflict with the Constitution, then extraneous proof cannot be used to condemn it. The history and origin of the enactment we are now considering may very properly be referred to to test its validity, and ascertain its true intent and proper interpretation. It has been said that courts will place themselves in the situation of the legislature, and by ascertaining the necessity and probable objects of the passage of a law, give effect to it, if possible, according to the intention of the law makers, when that can be done without violating any constitutional provision. (*People v. Supervisors*, 43 N. Y. 130.) Chapter 352 of the Laws of 1886, entitled "An act to authorize the appointment of a commission to investigate and report to the legislature the most humane and approved method of carrying into effect the sentence of death in capital cases," provided for the appointment of a commission consisting of three eminent citizens, who were named therein, and required them to investigate and report to the legislature on or before the fourth Tuesday of January, 1887, the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases. To enable this commission to make its investigation most thorough, the legislature extended the time for it to report for a year longer by chapter 7 of the Laws of 1887. This commission early in the legislative session of 1888 made its report, accompanied with a proposed bill which the legislature afterward and during the same session enacted, and this is the statute which is now attacked in behalf of the relator as an unauthorized expression of the legislative will. The legis-

Opinion of the Court, per O'BRIEN, J.

lature proceeded to change the mode of executing the sentence of death with care and caution and unusual deliberation. It would be a strange result indeed if it could now be held that its efforts to devise a more humane method of carrying out the sentence of death in capital cases, have culminated in the enactment of a law in conflict with the provisions of the Constitution prohibiting cruel and unusual punishments. Whether the use of electricity as an agency for producing death constituted a more humane method of executing the judgment of the court in capital cases, was a question for the determination of the legislature. It was a question peculiarly within its province, and the means at its command for ascertaining whether such a mode of producing death involved cruelty, within the meaning of the constitutional prohibition, were certainly as satisfactory and reliable as any that are consistent with the limited functions of an appellate court. The determination of the legislature of this question is conclusive upon this court. The amendment to the Code of Criminal Procedure changing the mode of inflicting the death penalty, does not, upon its face, nor in its general purpose and intent, violate any provision of the Constitution. The testimony taken by the referee, while not available to impeach the validity of the legislation, may, we think, be regarded as a valuable collection of facts and opinions touching the use of electricity as a means of producing death, and for that reason as part of the argument for the relator, but nothing more. We have examined this testimony, and can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the Constitution, though it is certainly unusual. On the contrary, we agree with the court below that it removes every reasonable doubt that the application of electricity to the vital parts of the human body, under such conditions, and in the manner contemplated by the statute, must result in instantaneous and consequently in painless death.

The order appealed from should be affirmed.

All concur.

Order affirmed.

Statement of case.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
WILLIAM KEMMLER, Appellant.

It seems, expert evidence is entitled to consideration only when fairly given by one properly qualified to give it by experiment, study and scientific eminence and upon a hypothesis which is true in the relation of its parts to the whole case which is the subject of the inquiry.

Upon the trial of an indictment for murder, evidence was admitted as to quarrels between defendant and deceased and as to conversations between them. *Held*, proper, as tending to show the existence of motive.

Physicians who had been sent to the jail by the district attorney to make an examination of the prisoner were permitted to testify, as witnesses for the prosecution, to his mental condition, under the objection that either the relation of patient and physician existed, or else the prisoner was compelled to furnish evidence against himself. *Held*, no error; no evidence having been called for as to the prisoner's statements or as to transactions in the jail.

People v. Stout (3 Park. C. R. 670), distinguished,

The court was requested, but refused, to charge that in fixing the grade of crime, evidence of intoxication was important, and must be carefully weighed; but did charge that all the evidence in the case was to be weighed; that it was not the province of the court to state what evidence is important or otherwise, that being for the jury to determine. *Held*, no error; that while, *it seems* it would not be improper for the court to characterize the evidence of a fact as important, and give its opinion as to its weight if the question was fairly left to the jury, it was under no obligation to do so.

The jury after its retirement, desired additional instruction as to the grade of the crime and as to certain evidence, which was given without objection, the court reading certain portions of the evidence. The additional instructions covered no more than did the main charge and simply pointed out the proofs which bore upon the act of killing. *Held*, no error.

Punishment by death is not cruel within the meaning of the constitutional prohibition (art. 1, § 5) against the infliction of cruel and unusual punishments; and while the infliction of the death penalty by a new agency is unusual, the adoption of such an agency which is not a certainly prolonged or torturous procedure, is not violative of the constitutional provision.

(Argued February 25, 1890; decided March 21, 1890.)

APPEAL from judgment of the Court of Oyer and Terminer of the county of Erie, entered May 14, 1889, upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are set forth in the opinion.

Opinion of the Court, per GRAY, J.

C. W. Sickmon for appellant. The court erred in permitting the witnesses Phelps and Slacer, physicians, called on behalf of the people to testify as to the mental condition of the defendant. (*People v. Stout*, 3 Parker's Crim. Rep. 670; *Eddington v. M. L. I. Co.*, 67 N. Y. 197.) The court erred in refusing to charge "that in fixing the grade of crime of which the defendant is guilty, the evidence of his intoxication must be carefully weighed." (*People v. Batting*, 49 How. Pr. 392.) The instructions given by the court in pursuance of the request of the jury after its retirement, were erroneous and prejudicial to the defendant. (*People v. Wileman*, 44 Hun, 187.)

George T. Quimby for respondent. In no sense was the relation of physician and patient created. (*People v. Schuyler*, 106 N. Y. 298, 304, 385.)

GRAY, J. The defendant was indicted for the killing of Matilda Ziegler and, after a trial at the Erie county Court of Oyer and Terminer, he was found guilty of murder in the first degree. He was thereupon sentenced to suffer the punishment of death, to be inflicted by the application of electricity, as provided by the Code of Criminal Procedure. The killing by the defendant was conclusively proved. No attempt was even made to dispute that fact, as established by his admissions to several persons and by the circumstantial proof; but the defense relied upon was the mental irresponsibility of the prisoner, which was attempted to be shown to be the result of the effect of the habitual use of alcoholic stimulants, and of hereditary taints of drunkenness in the father and of consumption in the mother. The deceased was the paramour of the defendant. They had eloped from Philadelphia, where she had left her husband and he his wife. They were residing together in Buffalo, and the deceased came to her death as the result of repeated blows upon her head and body from a hatchet in the defendant's hands. No justification, or excuse, for the act of killing was attempted by him, and in the brief of his counsel none is offered. We are led by the evidence to infer that jealousy of the deceased and domestic broils, stimulated,

Opinion of the Court, per GRAY, J.

I should judge, by his constant drunkenness, furnished the motive for this brutal crime. But whether we can attribute the commission of the act to some certain motive, or not, is wholly immaterial. The fact of the deliberate killing and the absence of any palliative proofs leave the defendant liable for the legal consequences of his acts; unless from the evidence it could be found that his mind was so enfeebled as to render him an irresponsible member of human society. A consideration of the case leaves the mind unembarrassed in reaching the conclusion that the defendant was possessed of sufficient mental capacity to understand the nature of his act and to distinguish right from wrong.

The record before us discloses the commission of the crime early in the morning of March 29, 1888. The defendant, under the assumed name of John Hort, was a huckster of market produce, and had a wagon which he kept in a barn in the rear of his residence. Upon that morning he was about the barn, giving orders to his employes and attending to his horses and to various matters. He was quite sober, and presented no unusual appearance. The deceased came out from the house to the barn and asked for some eggs, which defendant got for her from his wagon. He went into the house after her and then attacked her by blows of a hatchet; the noise of which was heard by some of the witnesses, and by one witness in an adjoining room, in addition to the hacking noise, was heard the scream of the woman. The defendant was then seen coming out of the house, wiping blood from his hands. The woman was found upon her arms and knees on the floor, swaying to and fro, with blood upon and about her. She was removed to a hospital and the next day died from the wounds she had received upon her head, which counted over twenty in number. The defendant, to inquiries from persons who saw him immediately after the occurrence, said he had killed her and would "take the rope for it;" or, "I want to hang, I want the rope."

The evidence shows that the defendant and deceased had, at times, quarreled, because of his drinking, and she had threat-

Opinion of the Court, per GRAY, J.

ened to return to Philadelphia. A man, named DeBella, was employed by defendant in his business and was on intimate terms with him and the deceased, in the sense of being an inmate of the family and a companion in the defendant's carouses. It was testified that the defendant, subsequently to the murder, said that he was jealous of DeBella, and he may have questioned the relations between his wife and him.

Many witnesses were examined by his counsel with respect to the defendant's habits of life, and one, a medical expert, gave his testimony as to the effects of the continued use of alcohol upon the human system. As to the first class of witnesses, their evidence amounted to nothing more than to establish the fact that the defendant was a hard and habitual drinker and was frequently intoxicated. These witnesses were mostly the companions of his sprees, or the witnesses of his drunken debauches. The medical witness had examined the prisoner in the morning before he gave his evidence and his opinion was that he was a man of weak intellect, of imperfect brain development and more or less incapacitated to appreciate what transpires before him. These conditions, he thought, were indicated by the prisoner's physical appearance and the conversation he had with him. He also, upon a hypothetical question, gave evidence that such a mind would be unsound and incapable of discriminating as to the quality of his act. But the hypothetical question did not state the exact case of the prisoner, as developed by all of the evidence respecting his life and habits and by those circumstances which give truthful color and semblance to human life and conduct. It dealt with probabilities and not with realities. Expert evidence is only, it seems to me, entitled to much importance in arriving at a judgment, when fairly given by one properly accredited to give it, through his experience, study and scientific eminence, and upon a hypothesis which shall be true in the relation of its parts to the whole case which is the subject of inquiry. The frequent spectacle of scientific experts differing in their opinions upon a case, according to the side upon which retained, tends much to discredit such testimony, or to impair its force and useful-

Opinion of the Court, per GRAY, J.

ness, and inclines us to prefer the formation of an opinion upon the real facts, when the case is not one beyond the penetration and grasp of the ordinary mind. Here we have, as against this expert's evidence for the prisoner, that of two physicians, more or less qualified to pronounce upon the question of insanity from the physical appearance of the subject, to the effect that there was nothing in the prisoner's physical make-up, upon which an opinion of the prisoner's unsoundness of mind could be based. They expressed the opinion that he was able to distinguish between right and wrong and that his conduct, on the fatal morning, and subsequently, displayed a consciousness of the nature and quality of his act. But, beyond that kind of evidence, we have ample testimony of a more satisfactory kind, from those who knew him and who were constantly in the habit of seeing and of transacting business with him. From that evidence the defendant appears to have had a sufficient amount of intelligence and sagacity to conduct his business affairs with a measurable degree of success. All the facts respecting his habits of life, the conduct of his affairs, his appearance and actions before, at the time of and subsequent to the commission of the criminal act, were before the jury and we cannot say that there was any absolute, or positive, or preponderating evidence of unsoundness, or enfeeblement, of mind to warrant our interfering with the verdict.

We are asked to review some exceptions. It was argued that the court erred in permitting the testimony of witnesses as to the quarrels between the defendant and deceased; as to conversations between them, and as to statements of the defendant to others in relation to the desire of the deceased to return to Philadelphia. Such evidence, however, tends to show the existence of motives in the defendant and of possible influences acting upon his mind; and it is proper in aid of the jury's investigations of the occurrence and of its probable, or possible causes.

It is urged that the court erred in permitting the physicians, called as witnesses for the people, to testify as to the mental condition of the prisoner. The argument is that either the

Opinion of the Court, per GRAY, J.

relation of patient and physician existed, or else the prisoner was compelled to furnish evidence against himself. These physicians were sent to the jail by the district attorney to make an examination of the prisoner's mental and physical condition. On the stand they were not inquired of as to the conversations had with him, or as to the transactions in the jail. Their testimony was simply their opinion of his mental condition, as they saw him in his cell and in the court room, but they gave no evidence of his statements, or of his physical condition. Such evidence is quite unobjectionable. In the case of *People v. Stout* (3 Parker's Crim. Rep. 670), the visiting physicians attended and prescribed for the injured prisoner and they were allowed to describe his condition. That was held to be an error. But no such feature exists in this case.

An exception was taken to the refusal of the court to charge "that in fixing the grade of crime, of which the defendant is charged, the evidence of his intoxication becomes very important and must be carefully weighed." But the court, in response, did charge that "all the evidence in the case is to be carefully weighed, but it is not in the province of the court to tell you what is important or otherwise. You are to determine the importance of the testimony." We think the court committed no error in refusing to charge in the precise words of the request. Under our system of procedure it would not be improper for the trial judge to characterize the evidence of a fact, or of a condition of things, as important, upon the trial of the case, but he is under no obligation to make any comments of that nature. He may state the evidence and call attention to its features, and even express an opinion upon its weight, if the question is fairly left to the jury. It is their province to determine the conclusiveness of its bearing upon the guilt or innocence of the accused.

Finally, it is urged that when the jury returned to the court room and desired instructions upon certain points, in regard to the evidence of certain witnesses, and as to the definitions of the first and second degree of murder, the court erred in the giving of its further instructions, after the reading of the

Opinion of the Court, per GRAY, J.

evidence referred to in the foreman's request. But the court, in its instructions, covered no more ground than before in the main charge, and simply pointed out those proofs which bore upon the commission of the act of killing. Such instructions were asked for, in effect. There was no objection made at the time to a compliance with the request of the jury, and a consideration of their tenor does not reveal any bias, or hostile instruction, by which the prisoner might have been prejudiced. The details were ghastly enough to require no comment, and the facts were sufficiently undisputed to speak eloquently for themselves.

The trial was most fairly conducted by the prosecution and every effort was made to avoid improper evidence and to eliminate the presence of technical as well as substantial objections. The court was equally as solicitous, in the conduct of the trial, to prevent the introduction or retention of improper and illegal evidence, and in the charge fully, fairly and correctly stated the facts to the jury and the rules of law which were applicable to the issue they were to decide. They were instructed that they must acquit if the prisoner was irresponsible, and they were told that though voluntary intoxication did not make the act less criminal, yet, in determining the purpose, motive, or intent with which the act was committed, they might take into consideration the fact of intoxication.

A last point is made on this record, and that is, that the sentence imposed is illegal and unconstitutional, as being a cruel and unusual punishment. As that is the subject of review upon another record,* and will be discussed by another member of this court, I shall not stop to consider it here. I may add, however, that I think the point untenable. Punishment by death, in a general sense, is cruel; but, as it is authorized and justified by a law, adopted by the people as a means to the end of the better security of society, it is not cruel within the sense and meaning of the Constitution. The infliction of the death penalty through a new agency is, of course, unusual; but as death is intended as the immediate sequence

*See *People ex rel. v. Durston*, ante, p. 569.

Statement of case.

of the mechanical operation prescribed, it is not unusual in the sense that some certainly prolonged or torturous procedure would be understood to be. In my judgment, we should assume that the enactment of the legislature was based upon some investigation of facts, and, where the declared purpose and end of the law are the infliction of death upon the offender, we may not say, upon a ground work of possibilities and guess work, that it is, in any sense, an unconstitutional act, because a new mode is adopted to bring about the death.

There is no feature in this case which, in my opinion, mitigates the atrocity of the defendant's conduct, or any error of law which calls for another trial.

The judgment rendered upon the verdict of the jury should be affirmed.

All concur.

Judgment affirmed.

JAMES J. PHELAN, Appellant, v. MARGARET BRADY, Impleaded,
etc., Respondent.

Actual possession of real estate is sufficient notice to all the world of the existence of any right which the person in possession is able to establish. In an action brought to foreclose a mortgage upon certain premises given by M., who held an apparently perfect record title to the same, it appeared that before the execution of the mortgage, M. had conveyed the premises to B. who was in possession, and, with her husband, occupied two rooms in the buildings on the premises; he also kept a liquor store in a part thereof; the other rooms she leased to various tenants, claiming to be the owner, and she collected the rents. Her deed was not recorded until after the giving of the mortgage. *Held*, that B.'s actual possession under her deed, although unrecorded, and its existence unknown to the plaintiff, was sufficient notice to him of her rights to defeat any claim under the mortgage.

Also, *held*, that the fact B. and her husband occupied the store and a living apartment in the building prior to the time she went into possession under her contract of purchase could not aid the plaintiff.

(Argued March 8, 1890 ; decided March 21, 1890.)

119	587
140	347
119	587
152	48
119	587
160	52
119	587
165	580

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 19, 1888, which affirmed a judgment in favor of defendant, dismissing plaintiff's complaint on the merits, upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are set forth in the opinion.

N. B. Hoxie for appellant. The plaintiff had not constructive notice of defendant's claim. (*Williamson v. Brown*, 15 N. Y. 362, 364; *Pope v. Allen*, 90 id. 298, 303; *Cooke v. Travis*, 20 id. 400; *Staples v. Fenton*, 5 Hun, 172; 3 Wash. on Real Prop. 317; *Claiborne v. Holmes*, 51 Miss. 146; *Billington v. Welch*, 5 Binney, 129; *Page v. Waring*, 76 N. Y. 463, 471; *Chesterman v. Gardener*, 5 Johns. Ch. 29; *Grinstone v. Carter*, 3 Paige, 421; *Webster v. Van Steenberg*, 46 Barb. 212.)

William E. Wyatt for respondent. The defendant Margaret Brady's possession and occupation under a deed, though unrecorded, was notice as to her ownership of the property. (Gerard on Real Estate, 593, 594; *Goreneur v. Lynch*, 2 Paige, 300; *Bank of Orleans v. Flagg*, 3 Barb. 318; *Tuttle v. Jackson*, 6 Wend. 213; *Moyer v. Hinman*, 13 N. Y. 184; *Trustees, etc., v. Wheeler*, 61 id. 88-98; *Cavalli v. Allen*, 57 id. 517; *Chesterman v. Gardner*, 5 Johns. Ch. 39; *Territt v. Cowenhoven*, 11 Hun, 320; *Troup v. Hurlbut*, 10 Barb. 354; *Smith v. Jackson*, 76 Ill. 254; *Greer v. Higgins*, 20 Kan. 420; *Brown v. Volkening*, 64 N. Y. 76-83; *Page v. Waring*, 76 id. 463-470; *Seymour v. McKinstry*, 106 id. 230-238; *Robinson v. Wheeler*, 25 N. Y. 260; *People v. Snyder*, 41 id. 402; *Seymour v. Van Slyck*, 8 Wend. 403, 404; *Sharder v. Bunker*, 65 Barb. 608; *Brown v. Austin*, 30 id. 358; *Ernest v. Reed*, 49 id. 367; *Tracy v. Snowden*, 23 Wkly. Dig. 41; *Moyer v. Hinman*, 13 N. Y. 184; *Merithew v. Andrews*, 44 Barb. 200; 2 Pomeroy's Eq. Juris. 665.) The fact that the property in question is a tene-

Opinion of the Court, per O'BRIEN, J.

ment-house, has no proper bearing on the question, and cannot change the rule. (*Page v. Waring*, 76 N. Y. 470; *Crosland v. M. S. F. Assn.*, 121 Penn. St. 82, 83; *Brown v. Volkening*, 64 N. Y. 84; *De Ruyter v. Trustees, etc.*, 2 Barb. Ch. 556; 2 Pomeroy's Eq. Juris. 665.) The defendant was guilty of no negligence. (*Seymour v. McKinstry*, 106 N. Y. 230.) The defendant being in actual possession under a deed covering the premises, and claiming under a specific title adversely to John E. Murphy, plaintiff's mortgagor, the mortgage under the Revised Statutes is void. (*Fish v. Fish*, 39 Barb. 13; *Cary v. Goodman*, 22 N. Y. 174; *Bradstreet v. Clarke*, 12 Wend. 675; *Christie v. Gage*, 71 N. Y. 189.)

O'BRIEN, J. On the 23d day of July, 1886, the plaintiff loaned to the defendant John E. Murphy the sum of \$2,000, and took from him his bond, whereby he promised to pay the same with interest semi-annually in two years thereafter. On the same day, and as collateral security for the payment of the bond, Murphy and his wife executed, acknowledged and delivered to the plaintiff a mortgage upon certain real estate in the city of New York. The premises thus mortgaged consisted of a tenement building, or block, containing forty-three rooms or apartments, then occupied by twenty different occupants or families, as tenants from month to month, except that three of these apartments were occupied by the defendant Margaret Brady and her husband, who kept a liquor store in part of the building, and they occupied two living rooms in the rear of the store, the wife claiming to be the owner of the premises and collecting rents from the other tenants.

The plaintiff, at the time he made the loan, had no actual notice or knowledge of any title to the premises in Mrs. Brady, or any claim on her part to be the owner. When the first installment of interest became due upon the mortgage, default was made, and the plaintiff brought this action to foreclose under a provision in the mortgage making the whole sum due upon default in the payment of the interest when due. Margaret Brady being in possession was made a party to the action,

Opinion of the Court, per O'BRIEN, J.

and she answered, setting up the defense that prior to the execution and delivery of the plaintiff's mortgage, and on or about the 5th of May, 1886, she became the absolute owner in fee-simple of the premises described in the complaint and in the mortgage and of the whole thereof, and that upon becoming such owner, she took possession of the same, and that she has ever since continued in actual, open and notorious occupation and possession of the premises as such owner, and has ever since and still owns the same in fee-simple.

The trial court found that in March, 1886, Margaret Brady employed one Michael J. Murphy, an attorney, to examine the title to the premises in question and purchase the same for her, and before May 7, 1886, she gave said Murphy, as her attorney, the sum of \$6,700 to be used as part of the purchase-money; that Murphy procured a contract for the sale of the premises to be made between Mary S. Trimble, who then owned the same, and his son John E. Murphy the defendant, in which contract the said John E. Murphy appeared to be the purchaser of the premises; that upon the execution of this contract, about March 19, 1886, Michael J. Murphy paid to Mrs. Trimble part of the sum of \$6,700, which he had received for that purpose from Mrs. Brady, and the rest of that sum was paid to her on the 7th of May, 1886; that the balance of the purchase-price, namely \$16,000, was secured to be paid to Mrs. Trimble by a purchase-money mortgage; that on the same day the purchase-price was thus paid, Mrs. Brady's lawyer took from Mrs. Trimble a deed of the premises to his son John E. Murphy, and the deed was duly recorded on that day; that on the 1st of May, 1886, Mrs. Brady took possession of the premises under the contract claiming to own the same, and has ever since remained in possession and occupied the same herself and by her tenants; that she rented certain rooms in the building to tenants immediately thereafter; that she discharged the housekeeper who had before that date rented the premises and collected the rents for Mrs. Trimble, and moved herself into the rooms formerly occupied by the housekeeper, and that she has received the rents ever since the 1st

Opinion of the Court, per O'BRIEN, J.

of May, 1886; that on the fifth of May of that year a deed conveying the premises to Mrs. Brady was executed and duly acknowledged by the defendant John E. Murphy and his wife, and by him delivered to his son Michael J. Murphy as agent and attorney for Mrs. Brady; that Murphy never had any interest in the premises, never paid any part of the consideration money and never had possession of the same or any part thereof; that the said Michael J. Murphy retained the deed to Mrs. Brady in his possession until not later than the 25th of August, 1886, when he delivered the same to her and the same was recorded by her on the 26th of August, 1886, subsequent to the execution, delivery and record of the plaintiff's mortgage.

The trial court held that Mrs. Brady's title and possession was sufficient to defeat any claim under the plaintiff's mortgage, and dismissed the complaint, and this judgment has been affirmed by the General Term.

At the time of the execution and delivery of the mortgage to the plaintiff, the defendant Mrs. Brady was in the actual possession of the premises under a perfectly valid but unrecorded deed. Her title must, therefore, prevail as against the plaintiff. It matters not, so far as Mrs. Brady is concerned, that the plaintiff in good faith advanced his money upon an apparently perfect record title of the defendant John E. Murphy. Nor is it of any consequence, so far as this question is concerned, whether the plaintiff was in fact ignorant of any right or claim of Mrs. Brady to the premises. It is enough that she was in possession under her deed and the contract of purchase, as that fact operated in law as notice to the plaintiff of all her rights.

It may be true, as has been argued by the plaintiff's counsel, that when a party takes a conveyance of property situated as this was, occupied by numerous tenants, it would be inconvenient and difficult for him to ascertain the rights or interests that are claimed by all or any of them. But this circumstance cannot change the rule. Actual possession of real estate is sufficient notice to a person proposing to take a mortgage

Statement of case.

on the property, and to all the world of the existence of any right which the person in possession is able to establish. (*Gouverneur v. Lynch*, 2 Paige, 300; *Bank of Orleans v. Flagg*, 3 Barb. 318; *Moyer v. Hinman*, 14 N. Y. 184; *Tuttle v. Jackson*, 6 Wend. 213; *Trustees of Union College v. Wheeler*, 61 N. Y. 88, 98; *Cavalli v. Allen*, 57 id. 517.)

The circumstance that Mrs. Brady and her husband occupied the store and a living apartment in the building prior to the time that she went into possession under her contract of purchase as tenants under Mrs. Trimble, the then owner, cannot aid the plaintiff. It does not appear that he ever heard of that fact till after the commencement of this suit, and we cannot perceive how it would affect the result if he had. The trial court found that prior to making the loan the plaintiff was upon the premises for other purposes, and that then, by making inquiry, he could have ascertained the rights of Mrs. Brady in the property, and while the absence of such a finding would not change the result, it shows that the plaintiff's loss is to be attributed to his confidence in Murphy, who probably deceived him, and to his failure to take notice of Mrs. Brady's possession.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed. .

119	592
122	80

119	592
151	568

GEORGE ROUTLEDGE et al., Respondents, v. WORTHINGTON
COMPANY, Appellant.

The rule which rejects parol evidence when offered with respect to written contracts, has no application to a case where, of an original agreement which has been executed, a part only is in writing and the remainder is verbal.

The written memorandum of a contract required by the Statute of Frauds must contain, within itself or by reference to other writings, all the essential elements of a contract, and when it comes up to these requirements, neither party will be permitted to show that the contract was other or different than that stated.

Statement of case.

If, however, the writing is insufficient, but there has been such a performance as to take the case out of the operation of the statute, oral evidence is admissible to supply omissions and to establish what were the contractual relations of the parties.

In an action to recover for certain publications sold by plaintiffs to defendant, plaintiffs produced in evidence an agreement signed by defendant by which it agreed to take the publications at a price specified, amounting to \$4,000. It appeared that after the parties had come to an agreement in regard to the sale, defendant at plaintiffs' request for a formal order executed the writing. Defendant set up as a counter-claim, and offered to prove by oral evidence that plaintiffs agreed in consideration of the purchase, and as part of the agreement, that the trade-price at which they sold the publication should not be lowered, and claimed damages for a breach of that agreement. The testimony was rejected. *Held*, error; that the writing represented a part only of the contract, that is defendants undertaking, while that of plaintiffs rested simply in parol; that there was in fact no valid contract between the parties; but as it had been executed, this took the agreement out of the Statute of Frauds, and left the parties subject to and bound by the terms of the actual agreement made.

Routledge et al. v. Worthington Co. (23 J. & S. 565), reversed.

(Argued March 12, 1890; decided March 21, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 7, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict, and an order denying motion for a new trial.

This action was brought to recover payment for certain sets of Dickens' works sold by the plaintiffs to the defendant. To sustain his action, plaintiff read in evidence upon the trial the following paper, viz :

NEW YORK, *March* 8, 1886.

MESSRS. GEO. ROUTLEDGE & SONS :

GENTS — I agree to take 1,000 sets of Dickens' sheets, same as last, as under :

250 sets delivered as soon as printed.

250 sets to be delivered in July.

250 sets to be delivered in September.

250 sets to be delivered in November.

Terms 30 days from delivery, 5 per cent for cash.

SICKELS — VOL. LXXIV. 75

Statement of case.

We have ordered Baldwin to deliver boxes to Baldwin for the Bulwer. Terms cash, 30 days, \$4.00 per set.

Imprint of Dickens' change from "28 Lafayette Place to 747 Broadway," all else will do.

WORTHINGTON COMPANY.

The defendant admitted making the agreement for the purchase as alleged, but, by way of counter-claim, alleged that at the time it was made it was part of the agreement that the trade-price, at which the plaintiffs sold those works, should not be lowered, and that that price then was six dollars and fifty cents. The defendant sought to prove this agreement of the plaintiffs by parol testimony, but the proposed evidence was excluded.

By direction of the court the jury rendered a verdict for the plaintiffs.

Further facts are stated in the opinion.

E. Ellery Anderson for appellant. The court erred in excluding defendant's evidence of plaintiffs' agreement not to lower their trade-price of Dickens' works. (*Brigg v. Hilton*, 99 N. Y. 517; *U. T. Co. v. Whiton*, 97 id. 172; *Chapin v. Dobson*, 78 id. 74; Jones on Commercial Cont. § 133.) The court erred in excluding defendant's evidence as to the order. (*U. T. Co. v. Whiton*, 97 N. Y. 172, 178; *Juilliard v. Chaffee*, 92 id. 29; *Dana v. Fiedler*, 12 id. 40; *Newhall v. Appleton*, 114 id. 140; *Van Brunt v. Day*, 81 id. 251; *Riley v. N. Y., L. E. & W. R. R. Co.*, 34 Hun, 97; *Batterman v. Pierce*, 3 Hill, 171; *Welz v. Rodiers*, 87 Ind. 1; Jones on Com. Cont. § 138.) The court erred in refusing to permit the jury to assess the damages counter-claimed by the defendant. (Code Civ. Pro. § 1183.)

Charles U. Judson for respondents. The contract is a complete contract for the purchase, and could not be added to or varied by parol. (*Wilson v. Deen*, 74 N. Y. 534; *Lewis v. Jones*, 7 Bosw. 366, 370; *Curtiss v. Howell*, 39 N. Y. 213, 214; *Baker v. Higgins*, 21 id. 397; *Wright v. Weeks*, 25 id.

Opinion of the Court, per GRAY, J.

153; *Galen v. Brown*, 22 id. 40; *Eighmie v. Taylor*, 98 id. 288; 44 N. J. L. 331; *Noonan v. Bradleg*, 9 Wall. 407; *Williams v. Robinson*, 73 Me. 186.) The court properly refused to allow the question asked by defendant's counsel of a witness if it was a part of the custom of the trade when a purchase is made in large quantities that the seller shall not undersell or change the trade-price. (*Markham v. Jaudon*, 41 N. Y. 245; *Higgins v. Moore*, 34 id. 425; 2 Parsons on Cont. [4th ed.] 53; *Wadley v. Davis*, 6 Barb. 500; *Boardman v. Gaillard*, 1 Hun, 220.) There was no evidence upon which a jury could properly have proceeded to find a verdict for the defendant (upon whom the burden of proof was imposed in that regard) beyond what was allowed it, and the judge properly directed the verdict. (*Comrs. v. Clark*, 4 Otto, 278; *Baulec v. N. Y. & H. R. R. Co.*, 59 N. Y. 356; *Cagger v. Lansing*, 64 id. 417.)

GRAY, J. In the exclusion of evidence to show that the plaintiffs on their part agreed not to reduce the trade-price of the books, which the defendant had agreed to purchase, the learned trial judge committed an error which is fatal to this judgment. The instrument, upon which plaintiffs seek to charge the defendant with liability to them, resulted from a previous agreement between the parties for the sale and purchase of these sets of Dickens' sheets. Some arrangement had been agreed upon between them respecting the transaction, and, subsequently, in consequence of a request on behalf of the plaintiffs for a formal order, this writing was sent to them by defendant. There is no doubt or dispute as to its sufficiency to charge the defendant; but it represented only a part of the whole contract. Its execution is not denied, but the defendant's claim and allegation were that the plaintiffs, at the time the contract was entered into, engaged to do something on their part, and have failed to keep their agreement.

Now, this is the case as I understand it: There was an agreement entered into, whereby the plaintiffs undertook to sell and the defendant to buy a certain edition of the works of

Opinion of the Court, per GRAY, J.

Dickens, and there were stipulations made as to the terms and conditions of the sale and of the purchase. The defendant's undertaking is shown by the writing signed by it, but the plaintiffs' lay wholly in parol. There was no contract between the parties; but their agreement has been executed, and that suffices to take the matter out of the operation of the Statute of Frauds and leaves the parties, in an action to recover the price, subject to and bound by the conditions and terms of the actual agreement which they made. The defendant is concluded, *prima facie*, as to its promises in writing, but whether the plaintiffs promised something more than can be inferred from that writing, and which may constitute a separate undertaking, leading to the defendant's order, and what they did at the interview when the bargain was arranged, must be shown by a resort to the conversation. The testimony, which the defendant has sought to elicit, bore upon the transaction, and was offered with the view of proving what then was said and done about the matter of a sale.

The proposed evidence was predicated upon the allegation of a reciprocal engagement on the plaintiffs' part and relating to the same subject-matter. The trial judge committed no error in excluding the proposed evidence of what had been the agreement in respect to the selling-price in some prior transaction between the parties; but, in respect to this particular transaction, it was perfectly competent for the defendant to prove a separate and distinct undertaking of the plaintiffs with it that they would not affect its trade by reducing the trade-price. Under the Statute of Frauds, the memorandum must contain within itself, or by reference to other writings, all the essential elements of a contract, and, where that is the case, neither party will be permitted to prove that there was any other contract made than that one. If, however, it is not sufficient under the statute to constitute such a contract, but there has been such a performance as to take it out of the operation of the statute, parol evidence is admissible to supply omissions and to establish what were the contractual relations of the parties. In *Lockett v. Nicklin* (2 Exch. 93), which

Opinion of the Court, per GRAY, J.

was an action of debt for goods sold and delivered, the goods were furnished upon a written order of the defendant. The defendant offered parol evidence to prove that the terms, on which the order was given, were six months' credit, etc. The evidence was held admissible. It was there said by ALDERSON, B., "the documents in question are not a contract, but are writings, out of which, with other things, a contract is to be made. The question then is whether the defendant has not a right to adduce evidence, not to contradict the written instruments, but to show the real contract, of which the paper contains only one of the terms. In order to do this the defendant must resort to the previous conversation. * * * In holding this evidence admissible we do not trench on any of the cases." In *Batterman v. Pierce* (3 Hill, 171), Judge BRONSON sustained a defense to a note given by the defendant, upon the sale of a lot of wood on plaintiff's land, which was based upon the proof that the plaintiff had verbally agreed, prior to the sale, that if anything occurred to the wood through his means he would be accountable, and would guarantee the purchasers against any damage in consequence of his acts. The principle of the decision was that there were mutual stipulations between the parties, all made at the same time and relating to the same subject-matter, and the whole engagement was open to proof. The cases of *Chapin v. Dobson* (78 N. Y. 74), *Van Brunt v. Day* (81 id. 251), and *Brigg v. Hilton* (99 id. 517), fully sustain the proposition that in such a case as this, where the agreement of the plaintiffs rested in parol, it is open to proof. The rule which rejects parol evidence, when offered with respect to a contract between parties and put into writing, has no application to a case like this, where, of the original agreement which has been executed, a part only is in writing and the rest was verbal. The principle of liability is the same, whether the whole transaction be embodied in one written instrument, setting forth the respective obligations of both parties, or whether it takes the form of a separate undertaking by each party. Whether we regard the writing of the defendant as an order, or as an agreement is

Statement of case.

quite immaterial. In either view, it was an admission only of the defendant's engagement.

We do not agree with the appellants' counsel that there was any ambiguity in that paper, which called for explanation by parol evidence. It was clear and explicit enough, and the words "same as last," in reference to the agreement to take so many Dickens' sheets, plainly indicated the kind of sheets and nothing more. Any other meaning would be forced and unnatural.

As the views I have expressed lead to a reversal of the judgment appealed from, it is not necessary for us to discuss the other question as to the assessment of damages, which the counsel for the appellant has argued. Upon a new trial any question in that respect may be obviated.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

JAMES E. HOLCOMB, Appellant, v. GEORGE RICE, Impleaded,
etc., Respondent.

In a proceeding by reference to ascertain the damages sustained by a party in consequence of an injunction restraining him from exercising some legal right, it is proper to allow as part of the damages the expenses incurred upon the reference.

In proceedings to assess damages upon an undertaking given by plaintiff, in an action to set aside a bond and mortgage, in accordance with the condition of an order granting a temporary injunction to restrain a foreclosure, it appeared that there remained, after paying the costs of the foreclosure, the costs of the action and the deficiency upon the sale, in accordance with the terms of the undertaking, a margin sufficient to cover the damages allowed upon confirmation of the referee's report. The sureties bid in the property on the foreclosure sale and sought to include as a payment on account of the undertaking, the amount of their bid; this was disallowed. *Held*, no error; that the purchase of the premises by the sureties to protect themselves did not affect the question of the damages assessable against them.

(Argued March 12, 1890; decided March 21, 1890.)

Statement of case.

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made May 4, 1886, which affirmed an order of Special Term, confirming in part the report of a referee assessing damages sustained by defendant by reason of an injunction.

This action was brought to set aside a bond and mortgage and to have the same cancelled as usurious. A temporary injunction was asked for and granted on condition "that the plaintiff give security by undertaking with sufficient sureties, in the sum of \$4,000, * * * said undertaking to contain a provision that the plaintiff will pay to the said Rice the costs of the attempted statutory foreclosure, and the costs heretofore made and hereafter made in this action, and the deficiency that there may be on sale of the premises under the \$3,000 mentioned in the complaint, and all damages not exceeding in all the said sum of \$4,000 which he, the said Rice, may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto." An undertaking was given in compliance with the condition.

Upon trial of the action the complaint was dismissed. The foreclosure was proceeded with, and on sale the sureties bid off the property for \$1,325, which sum they paid, also the deficiency arising after application of the sum bid on the bond, and the costs of foreclosure, the costs in this action, interest, etc., amounting to \$2,883.92, the whole sum paid being \$4,208.92.

In proceedings to assess defendant's damages on the undertaking, the court allowed as damages the referee's and stenographer's fees on the reference, amounting to \$381.01. The sureties appealed, claiming that the amount bid on the foreclosure should have been allowed, and that this, with the items paid, was more than the amount of the undertaking.

Leslie W. Russell for appellant. The expenses of the reference should not be charged to the sureties as damages necessarily incurred by Rice. (*Newton v. Russell*, 87 N. Y. 527; Code Civ. Pro. §§ 623, 3236, 3240.) The court erred in allow-

Opinion *per Curiam*.

ing for the unsuccessful effort to vacate the injunction, the expenses not only of two counsel, but of the defendant also, to Saratoga, and the charges of two counsel for arguing the motion. (*Lyon v. Hersey*, 32 Hun, 253; *Randall v. Carpenter*, 88 N. Y. 293.) This relief should not be granted to the defendant Rice on account of his delay. (*M. Church v. Barber*, 18 N. Y. 463; *James v. Hackett*, 16 Johns. 273; *Wakeman v. Goudy*, 10 Bosw. 208; *Craig v. Parkis*, 40 N. Y. 181; *Toles v. Adee*, 222.)

E. Countryman for respondents. The expenses were caused by the sureties and not by the defendant, and they should pay the cost thereof. (*Personnette v. Johnson*, 40 N. J. Eq. 532; *Rose v. Post*, 56 N. Y. 603; *Aldrich v. Reynolds*, 1 Barb. Ch. 613.) The case is clearly within the general doctrine rendering the sureties liable for all the damages sustained, including all counsel fees and expenses incurred by the defendant by reason of the injunction. (*Edwards v. Bodine*, 11 Paige, 224; *Corcoran v. Judson*, 24 N. Y. 106; *Andrews v. G. W. Co.*, 50 id. 282; *Rose v. Post*, 56 id. 603.)

Per Curiam. Upon a proceeding to ascertain the damages sustained by a party in consequence of an injunction restraining him in the exercise of some legal right, it is proper to allow, as a part of the damages, the expenses incurred upon the reference. (*Aldrich v. Reynolds*, 1 Barb. Ch. 613; *Lawton v. Green*, 64 N. Y. 326.) After complying with the terms of the undertaking by paying the costs of the foreclosure proceedings, the costs in the action and the deficiency upon the sale of the mortgaged premises, there still remained a margin in the amount of the undertaking, sufficient to cover the damages allowed by the court upon the confirmation of the referee's report. The sureties could not include as a payment on account of their undertaking, the amount at which they bid in the premises upon the foreclosure sale. Their undertaking was to indemnify the defendant mortgagee upon the injunction obtained by the plaintiff, pending his action to

Opinion per Curiam.

restrain foreclosure proceedings and sale under the mortgage. If they purchased the premises to protect themselves, that fact in no wise affects the question of the damages assessable against them. The delay in taking the proceeding to assess the damages against the sureties did not affect the claim on the undertaking. In the settlement between the mortgagee and the sureties after the foreclosure sale, the balance of the claim for damages was left open for future adjustment. The referee so found and there was evidence to support his finding.

The other questions have been rightly disposed of and the order should be affirmed with costs.

All concur.

Order affirmed.

SICKELS —.VOL. LXXIV. 76

MEMORANDA

OF THE

*CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.*

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.*
SAMUEL P. HILL, Respondent.

(Argued and decided January 14, 1890.)

W. H. Johnson for appellant.

H. R. Gilbert for respondent.

APPEAL dismissed on argument.

AUGUSTA OTTENOT, as Executrix, etc., Respondent, *v.* THE
NEW YORK LACKAWANNA AND WESTERN RAILWAY COM-
PANY, Appellant.

In an action against a railroad corporation to recover damages because of its interfering with plaintiff's rights in a street adjoining his premises, plaintiff is not entitled to a recovery for permanent diminution in value of the premises; but only damages sustained prior to the commencement of the action.

(Argued November 26, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Superior Court of Buffalo, entered upon an order made October 8, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This action was brought to recover damages to plaintiff's premises, by reason of the building of an embankment by defendant on an adjoining street.

119	603
190	661
119	608
128	169
128	170
119	603
136	530

119	608
154	557
119	608
Case 2	
169	278

As a majority of the court did not concur in the opinion, it is not reported in full. The only portion of the opinion in which a majority agree is the following:

"The plaintiff was not entitled to recover for the permanent diminution in value of his lots, but was entitled only to recover such damages as he sustained prior to the commencement of the action, within the rule laid down in the *Uline Case** and in *Pond v. Metropolitan Elevated Railroad Company* (112 N.Y. 186)."

John G. Milburne for appellant.

LeRoy Parker for respondent.

EARL, J., reads for reversal and new trial.

FINCH and GRAY, JJ., concur; RUGER, Ch. J., ANDREWS and PECKHAM, JJ., concur in result on the ground that there is another remedy,' and because of the erroneous admission of evidence as to damages.

Judgment reversed.

119	604
j165	407

THOMAS R. RUTHERFORD, as Assignee, etc., Appellant and Respondent, *v.* JULIUS SCHATTMAN, Impleaded, etc., Appellant and Respondent.

An exception to a finding of fact does not reach an erroneous reason given for it in an opinion of the court accompanying its decision; if there is in any view evidence to sustain it, this court is bound by it.

On trial of an action to set aside an instrument on the ground of conspiracy and fraud, in the absence of any proof connecting a person not a party to the action with the alleged conspiracy, his acts or declarations are immaterial and inadmissible; to make them competent, *prima facie* evidence must first be given of the existence of the conspiracy, and of the connection of the person whose acts and declarations are sought to be proved.

In a confession of judgment it was stated that \$600 of the original debt had been paid. It appeared that only \$350 had been paid in cash, and that the debtor had assumed payment of a debt of \$250

* *Uline v. N. Y. C. & H. R. R. Co.* (101 N. Y. 98).

owed by his creditors to a third party. *Held*, that the statement was true, as the assumption of the debt amounted to a payment of its amount.

(Argued December 5, 1889; decided January 14, 1890.)

CROSS APPEALS from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1888, which modified, and affirmed as modified, a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiff, as assignee of one Morris Schattman for the benefit of creditors, to set aside a confession of a judgment made by the assignor previous to the assignment, on the ground of fraud and conspiracy. The trial court found, on evidence held by the court here to be amply sufficient, that there was no fraud or conspiracy, and that the judgment was confessed to secure an honest debt.

It was claimed by the plaintiff that the trial court, as shown by its opinion, based its finding on erroneous conclusions, and so gave undue weight to testimony denying the fraud, and not sufficient to that which tended to prove it.

The court here say: "The General Term could have remedied that error if it thought that it appeared, but when that court has affirmed the finding and there is in any view evidence to sustain it, this court is bound by it. An exception to a finding of fact does not reach an erroneous reason for it given in an opinion of the court accompanying its final decision."

Plaintiff offered in evidence certain statements or reports made by persons who were not parties to the action, but who, plaintiff claimed, were parties to the conspiracy. These were excepted to and rejected. The court say: "The materiality of the evidence as against any one, is not apparent, but a conclusive answer to its admissibility as against Auguste Schattman is that the reports were *res inter alios acta*. They were the acts of the bookkeeper of Schattman Brothers, of New York, and if it be assumed that he was their agent or representative, yet the Schattman Brothers were not parties to this

action, and neither their acts nor declarations were evidence against Auguste Schattman. If it be said that the complaint alleged a general conspiracy to defraud, and that Auguste Schattman was a party to it, and that the acts or declarations of a co-conspirator performed or made during the progress of the conspiracy and in aid thereof are evidence against all, the answer is that *prima facie* evidence ought first to be given of the existence of a conspiracy, before such acts or declarations are evidence against any but the party making them; and that there is no evidence whatever of the existence of any such conspiracy so far, at any rate, as Auguste Schattman is concerned. I do not think that the evidence was material in the first place, and if so, it was not admissible as against Auguste Schattman, and it was offered generally and against all."

The following is also an extract from the opinion: "There is no merit in the criticism regarding the statement of the confession of judgment. It is therein alleged that \$600 of the original debt from Martin to Auguste Schattman had been paid. It is now said that only \$350 had been paid in cash and the remaining \$250 had been paid by Morris Schattman assuming, at her own request, a debt Mrs. Schattman owed to a third party to that amount. That was, under the circumstances, a payment of so much of the indebtedness to Mrs. Schattman, and the statement was, therefore, true."

J. F. Parkhurst for plaintiff.

Randolph Sampter for defendants.

PECKHAM, J., reads for affirmance.

All concur.

Judgment affirmed.

THOMAS R. RUTHERFORD, as Assignee, etc., Respondent, v.
MARRIANNA BIOW, Impleaded, etc., Appellant.

THIS case was argued and decided with *Rutherford v. Schattman* (*ante*, p. 604).

CHARLES W. COOKE, an Infant, by Guardian, etc., Appellant,
v. THE LALANOE AND GROSJEAN MANUFACTURING COMPANY,
Respondent.

(Argued December 6, 1889 ; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 14, 1889, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at circuit.

Charles J. Patterson for appellant.

Samuel D. Morris for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

In the Matter of the Judicial Settlement of the Accounts of
ENOS G. LANEX, as Administrator, etc.

(Argued December 10, 1889 ; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1888, which modified and affirmed as modified a decree of the surrogate of Monroe county, upon the accounting of Enos G. Laney, as one of the administrators of James Laney, deceased.

Quincy Van Voorhis and *Frank M. Goff* for appellants.

Theodore Bacon for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ABBIE C. FITCH, Appellant, *v.* THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK, Respondent.

(Argued December 11, 1889 ; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made February 5, 1889, which affirmed a judgment in favor of defendants entered upon a verdict, and reversed an order dismissing the complaint on trial.

Edward S. Clinch for appellant.

William H. Clark for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

In the Matter of the Final Accounting of WALTON MCKINNEY,
as Administrator, etc.

(Argued December 11, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 2, 1888, which affirmed a decree of the surrogate of Broome county.

Arms & Curtis for appellant.

D. S. Richards for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

AARON B. COHU, Appellant, *v.* JOSEPH HUSSON, Respondent.

Where the proof establishing the existence of a valid claim against an estate was clear and uncontradicted, *held*, the exclusion of evidence that in a conversation between the executor and the holder of the claim in reference to a claim of the estate against him, nothing was said by him as to his claim, was not error justifying a reversal.

(Argued December 12, 1889 ; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made August 30, 1889, which affirmed a judgment in favor of defendant, entered upon a verdict.

This action was brought upon certain promissory notes executed by defendant. The answer set up as a counter-claim a note executed by Henry S. Cohu, plaintiff's testator, the amount of which exceeded those held by plaintiff. Plaintiff claimed that said note held by defendant was an accommodation note given without consideration. It appeared that the parties exchanged notes ; that Cohu indorsed and procured the note executed by defendant in exchange for the one set up as a counter-claim to be discounted ; that he allowed it to go to protest, and thereupon the defendant paid it. The trial court denied a verdict for defendant.

The following is an extract from the opinion :

"The witness was asked if Husson ever proved any claim against the estate of Henry S. Cohu. That was the very thing Husson was trying to do in the pending action, and whether he attempted it at any earlier time was immaterial. But another question was asked and excluded, about which there may be some room for doubt. That was, did Husson *ever* make any pretense or claim any indebtedness in his favor from Henry S. Cohu or his estate? A truthful answer to that question could only have been given in the affirmative, for it is beyond controversy that Husson did so claim when he filed his answer in the pending suit. Probably what was meant by the question was whether such claim was made by Husson in the talk about the Ripley notes. But the witness had already detailed that conversation and presumably the whole of it, and stated no such claim. Conceding, therefore, that the omission in

that conversation was proved, the only further inquiry is whether the fact was of sufficient importance as the case stood to require a submission to the jury. If the issue had been whether on the whole dealing between these parties Husson owed Cohu, or the reverse, the omission of the former to make a claim would have been quite pertinent. But that was not the issue. It was simply if the note counter-claimed was void in its inception. Husson may very well have assumed that if he paid the Ripley notes, which it was his duty to pay, and which he promised to pay, that the Cohu estate would pay the notes which it was its duty to pay, and so the exchanges be balanced and no claim exist on either hand. In the face of the clear and uncontradicted proof of a full consideration for the note set up in the answer, I do not think a verdict to the contrary founded on the failure of Husson to make his own claim in the conversation with the executor could be permitted to stand. The inferences from it are too ambiguous and equivocal to countervail the direct and positive proof of a consideration in fact existing. In a previous contest between these parties (113 N. Y. 662), the proof now given was notably absent, and the case rested so far upon inferences and presumptions as to make the silence of Husson in the conversation with the executor a serious fact to which we gave some weight. But on this trial the consideration of defendant's counter-claim is not left to depend upon presumptions, but is so fully proved as to make Husson's silence of very little consequence, and to suggest an explanation consistent with the proof. Indeed, such silence might tend to show a satisfaction of the demand, as was said in *Bean v. Tonnele* (94 N. Y. 381), but not where payment is neither pleaded nor pretended, and on the sole issue of valuable consideration or none, it has scarcely an appreciable effect as against direct and positive proof.

"The judgment should be affirmed, with costs."

Abram Kling for appellant.

William R. Wilder for respondent.

FINCH, J., reads for affirmance.

All concur.

Judgment affirmed.

WILLIAM W. GILBERT, Appellant, v. CHARLES E. LYDECKER,
Public Administrator, etc., Appellant.

(Argued December 13, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made July 9, 1889, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

S. B. Brownell for plaintiff.

Charles E. Lydecker for defendant

Agree to affirm; no opinion

All concur.

Judgment affirmed.

VAN RENSSELAER GETMAN, as Executor, etc., Appellant, v.
ALONSON B. INGERSOLL, Impleaded, etc., Respondent.

(Submitted December 13, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 2, 1888, which affirmed a judgment in favor of defendant entered upon the report of a referee.

Geo. W. Bradner for appellant.

C. C. Brown and *M. L. Wright* for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

WILLIAM S. HOLLINGSWORTH, Appellant, *v.* LUCY O. MOULTON
et al., as Executors, etc., Respondents.

(Argued December 13, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1889, which affirmed a judgment in favor of defendants entered upon the report of a referee.

Thaddeus D. Kenneson for appellant.

George J. Sicard for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JULIETTA HYLAND, an Infant, by Guardian *ad litem*, Respondent, *v.* THE YONKERS RAILROAD COMPANY, Appellant.

(Argued December 13, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 13, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

John F. Brennan for appellant.

Frank E. Blackwell for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

PETER GILLEN, as Administrator, etc., Appellant, *v.* THE
TUCKER AND CARTER CORDAGE COMPANY, Respondent.

(Argued December 16, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 11, 1889, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at circuit.

J. Stewart Ross for appellant.

Franklin A. Paddock for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JACOB SCHOLLE et al., Individually and as Executors, etc.,
Respondents, *v.* THE MAYOR, ALDERMEN AND COMMONALTY
OF THE CITY OF NEW YORK, Appellant.

(Argued December 16, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made July 20, 1889, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial without a jury.

David J. Dean for appellant.

Alexander B. Johnson for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

HERMAN J. BACHRAN, Respondent, *v.* BENJAMIN VON RADEN
et al., as Executors, etc., Impleaded, etc., Appellants.

(Argued December 17, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 21, 1888, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

James A. Deering for appellants.

William L. Snyder for respondent.

Agree to affirm on authority of *King v. Mayor, etc.* (102 N. Y. 171).

All concur.

Judgment affirmed.

CHARLES H. WARD, Respondent, *v.* JANE HARTLEY COWDREY,
as Executrix, etc., Appellant.

(Argued December 17, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 28, 1889, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

Nathaniel C. Moak for appellant.

J. C. Foley for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

In the matter of the Probate of the Last Will and Testament
of EDWARD D. HESDRA, Deceased.

Where the probate of a will was contested upon the ground that the instrument was fabricated after the death of the testator by O., one of the witnesses thereto, and the proof on the part of the contestants consisted mainly of acts and declarations of O., who had died prior to the trial, tending to show that the testator died intestate, and that O. fabricated the instrument, *held*, it was competent to prove declarations of O., during the life of the testator, to the effect that he had made a will. *It seems* that declarations of a deceased subscribing witness to a will are competent to impeach its execution so far as his signature thereto is concerned; they have no other effect however, than to impair the force of his signature as evidence of the performance of the conditions stated in the attesting clause.

Where, therefore, evidence is given sufficient to sustain a finding that the signatures to a will are genuine, the surrogate is not required to refuse probate by proof of declarations on the part of a deceased subscribing witness to the effect that he fabricated the will.

(Argued December 17, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made June 25, 1888, which affirmed a decree of the surrogate of Rockland county admitting to probate the will of Edward D. Hesdra, deceased.

Probate was contested on the ground that the instrument was fabricated, and the signatures of the testator and of one of the subscribing witnesses was forged by Onderdonk, the other subscribing witness, after the death of the testator. The other witness and Onderdonk were both dead at the time of the trial.

The court here, after a discussion of the evidence, reached the conclusion that there was sufficient to sustain the decision of the surrogate.

The evidence presented by the contestants to sustain their theory consisted of declarations of Onderdonk to the effect that Hesdra died intestate, and that he fabricated the will.

The following are extracts from the opinion:

“Some question has been made by the respondent as to the competency of the declaration of a subscribing witness to

impeach the execution of a will; but the case of *Losee v. Losee* (2 Hill, 612) seems to be an authority for the admissibility of such evidence. It is there said that 'proof of the signature of a deceased subscribing witness is presumptive evidence of the truth of everything appearing upon the face of the instrument relating to its execution, as it is presumed the witness would not have subscribed his name in attestation of that which did not take place. But this presumption may be rebutted, and, hence, the propriety and even necessity of permitting him to be impeached in the usual mode, as if he were living and had testified at the trial to what his signature imports. The reason for admitting such evidence in a case like the present was stated by BUGLEY, J., in *Doe v. Ridgway* (4 Barn. & Ald. 52), thus: He (the attesting witness to a bond) must have been called, if he had been alive, and it would then have been competent to prove by cross-examination his declarations as to the forgery of the bond. Now the party ought not, by the death of the witness, to be deprived of obtaining the advantage of such evidence.'

"The competency of this evidence is supported by an able note to the case from the learned reporter of the court, who was peculiarly qualified to discuss questions relating to rules of evidence.

"Assuming, therefore, for the purpose of this decision that all the evidence produced by the appellant was competent, and that the declarations of a subscribing witness are competent to impeach its execution, a question which we do not decide, as the decision being in favor of the appellant it becomes unnecessary to do so, we proceed with the examination of the case. The declarations of the subscribing witness Onderdonk, tending to show the forgery of the various signatures thereto affected the credibility of the witness alone, and had no other effect than to impair the force of his signature as evidence of the performance of the conditions stated in the attesting clause, and still left the question of fact, whether the will was properly executed, to be determined by the trial court upon all the evidence of the case. Assuming as we must, under the findings of the court, that all of the signatures to the will were

genuine, it remained for the trial court to determine whether the contradictory declarations made by one of the witnesses thereto, subsequent to its execution, were of such a character as required the surrogate to refuse probate to the will. Such declarations could have no greater effect than the positive evidence of the witness upon the stand to the same effect, and yet, even under such circumstances, wills have frequently been admitted to probate upon corroborating evidence derived from circumstances. (*Matter of Cottrell*, *supra*, and cases there cited.)

“The Code expressly provides that the proof of a will may be established when a subscribing witness has forgotten the occurrence of its execution, or testifies against it, upon proof of the handwriting of the testator and the subscribing witnesses, and of such other circumstances as would be sufficient to prove the will upon the trial of an action. (§ 2620.) This section received a practical construction in *Brown v. Clark* (77 N. Y. 369); *Matter of Pepoon* (91 id. 255), and *Matter of Cottrell* (95 id. 329), and was held to mean, in accordance with prior decisions cited, that the proof of circumstances bearing upon the question of the authenticity of the will in connection with a regular attestation clause duly executed, were, if sufficient to satisfy the court of its genuineness, all that was required to sustain the probate of a will.

“In the *Cottrell Case* the probate was sustained where both of the subscribing witnesses denied the genuineness of their signatures to the attestation clause, as well as the performance of conditions required by the statute. An examination of the condition, situation and relation of the parties, the disposition of property made by the will, and the other circumstances bearing upon the probabilities of the case satisfies us that there was sufficient corroborative evidence to establish the authenticity of the will. * * *

“It is claimed by the contestant that the surrogate erred in permitting the proponents to show confirmatory declarations by John V. Onderdonk, made prior to the death of Hesdra, to support the authenticity of the will. It is, undoubtedly, the general rule that when a witness has been proved to have

made contradictory statements, his evidence cannot be supported by proving that at other times he had made statements in harmony with his evidence. There are, however, well settled exceptions to the rule, and we think this case comes within them. (*Robb v. Hackley*, 23 Wend. 50.)

“The head-note to that case reads that ‘where the witness is charged with giving his testimony under the influence of some motive prompting him to make a false or colored statement, it may be shown that he made similar declarations at a time when the imputed motive did not exist. So in contradiction of evidence tending to show that the account of the transaction given by the witness is a fabrication of late date, it may be shown that the same account was given by him before its ultimate operation and effect arising from a change of circumstances could have been foreseen.’ This case has been frequently cited in the text writers and followed with approval by the courts of this state. (Greenl. on Ev. § 469; Whart. on Ev. § 570; *Dudley v. Bolles*, 24 Wend. 471; *Gilbert v. Sage*, 57 N. Y. 639; *Hotchkiss v. Germania Fire Ins. Co.*, 5 Hun, 90.)

“In *Gilbert v. Sage*, it is said that ‘as the aim of the cross-examination was to establish that so much of the conversation as was not detailed to defendant’s counsel was an after-thought and subsequent invention of the witness, it was proper to show in answer that the witness had previously told the same story.’ In *Hotchkiss v. Germania Fire Insurance Co.*, it was said by MULLEN, J., that ‘statements made by a witness corroborating his evidence on the trial, made soon after the transaction to which it relates, or when he was not under the influence of any motive to relate the transaction untruthfully, are competent where it is shown that he had given a different relation of the occurrence, or that he had testified under the influence of a motive calculated to induce him to testify falsely.’

“In *Herrick v. Smith* (13 Hun, 446), the same doctrine was laid down, and evidence to show corroborative statements made by the witness at a time when the alleged motive to testify falsely did not exist, were allowed.

“The case of *Robb v. Hackley* was also approved by Judge

MILLER in the case of *Railway Passenger Assurance Company v. Warner* (62 N. Y. 651). And see also *Wray v. Fedderke* (11 J. & S. 335).

“The contestant’s evidence tended to show that Onderdonk declared, after Hesdra’s death, that he intended to fabricate a will for Hesdra. We think it was competent within the authorities to rebut this evidence by proof of his declarations during Hesdra’s lifetime, that Hesdra had made a will.”

William W. MacFarland for appellants.

Garrett Z. Snyder and *Gratz Nathan* for respondents.

RUGER, Ch. J., reads for affirmance.

All concur, GRAY, J., concurring in result.

Judgment affirmed.

ADAM HENDERSON, as Administrator, etc., Appellant, v. THE
KNICKERBOCKER ICE COMPANY, Respondent.

(Argued December 18, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of March, 1889, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at circuit.

William A. Coursen for appellant.

Michael M. Forrest for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

119	620
122	453
119	620
124	81

CLINTON WEST, Respondent, *v.* BENJAMIN S. VAN TUYL et al.,
as Executors, etc., Appellants.

Upon the trial of an action to recover for services of plaintiff under a contract between him and V. T., defendant's testator, a book was offered in evidence, on the part of the plaintiff, which contained an account of work done for V. T. and others. There was oral testimony showing that it was correctly kept and had been recognized by V. T. in his settlements with other persons as accurate. The evidence was received under objection and exception. *Held*, no error.

In the absence of an exception to a finding of fact by a referee, or of a request to find differently, the finding is not reviewable here.

The rulings of a trial judge will be presumed to be correct until the contrary is shown, and an objection thereto will not, as a general rule, be entitled to consideration in an appellate court when no ground of error is suggested; the court is not required to search for grounds on which to differ from the court below.

(Argued December 19, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday in June, 1888, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover from Thomas Van Tuyl, the original defendant, the present defendant's testator, for plaintiff's services alleged to have been rendered under a contract in writing.

It was claimed by the appellant that a certain finding of fact by the referee was "unsupported by evidence of any kind."

The court say: "An answer to this proposition is found in the fact that no exception was taken to the finding, nor any request made to find differently. For aught that appears, it was acquiesced in or conceded to be true."

The following extract from the opinion presents the further points:

"Six other points consist of simple assertions that this or that question, calling for evidence and found on certain pages of the record, was improperly allowed to be answered. In this respect no ground of error has been suggested, either in the points or on oral argument, nor is any sufficient reason given for the claim made. An objection so stated is rarely, if

ever, entitled to consideration in an appellate court. On the contrary, a verdict, or a report of a referee, and the rulings of a trial judge will be presumed to be correct until the contrary is shown. It would be not only unreasonable, but unjust, to regard them in any other manner. Nor can we be required to search for grounds on which to differ from the court below.

“The only point which presents a question of law is that relating to the admission in evidence of a certain book called ‘Exhibit M.’ It contained an account of the work done, not only for the defendant, but for other parties. There was testimony tending to show that the book was correctly kept, and, indeed, to have been recognized by the defendant in his settlements with other persons, as accurate. It was competent as evidence, and, supplemented as it was in many respects by oral testimony, was admissible and entitled to such weight as, in view of all the circumstances, the referee thought proper to give to it. The General Term have also considered this question, and, in the conclusion reached by the learned judge who delivered its opinion, we concur.

“The remaining point relates to the allowance by the referee for services rendered by the plaintiff’s hired men and teams. There is evidence which warrants it, but as no exception was taken, nor request made to find differently, it need not be discussed.”

Jay K. Smith for appellant.

William H. Nichols for respondent.

Per Curiam mem. for affirmance.

All concur.

Judgment affirmed.

ELBERT W. HAUXHURST, Respondent, *v.* THOMAS J. RITCH, JR.,
as Administrator, etc., Appellant.

The allowance of costs, upon a reference under the statute of a disputed claim against an estate, is within the discretion of the court below, and is not reviewable here.

(Submitted December 19, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made January 28, 1889, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This was a reference, under the statute, of a disputed claim against the estate of Nathaniel O. Hauxhurst, deceased. The claim was upon a promissory note executed by decedent. The defense was that the note was given without consideration.

The following is the *mem.* of opinion :

“The first question raised on this appeal is wholly one of fact. The claim of the plaintiff rested upon a note given by the deceased. The defense was that the note was without consideration. The referee found to the contrary, and while the facts are susceptible of some criticism and open to more dispute, it cannot be said that there was no evidence to sustain the finding.

“Exceptions were taken to the ruling of the referee in admitting certain questions asked of the plaintiff. These were whether any part of the note had been paid, and whether he was the holder of the note. It is a sufficient answer to the objection, that the questions were totally immaterial and entirely superfluous. If they should be stricken wholly from the case, the non-payment of the note would stand presumed till proof was given to the contrary, and the production of the note made him *prima facie* its holder and owner. But in answering the last question, the witness went beyond its scope and added ‘it has been in my possession since April 1, 1878.’ The case adds, ‘This last taken subject to same objection, ruling and exception.’ The meaning seems to be that, while the latter part of the answer was not responsive to the inquiry which drew it out, yet the objections to that inquiry should apply to the irresponsible answer. Those were that the question was ‘leading, not necessary to the *prima facie* showing, and presumption of law makes it unnecessary.’ The objection here argued was none of those, but one under section 829 of the Code, which was not taken either to the question itself or to any part of the answer. That objection was taken to the inquiry as to non-payment, but to that

only. No other objection is argued, except to the allowance of costs which were in the discretion of the court and not subject to our review. (*Denise v. Denise*, 110 N. Y. 568.)

"The judgment should be affirmed with costs."

George C. Brainerd for appellant.

E. G. Duvall, Jr., for respondent.

FINCH, J. read for affirmance.

All concur.

Judgment affirmed.

GEORGE W. BRAYTON, Individually and as Assignee, etc.,
Respondent, *v.* DARWIN W. SHERMAN, as Surviving Exec-
utor, etc., Impleaded, etc., Appellant.

119	623
133	651
119	623
150	861
119	623
163	102

It seems, where an appellant intends to review, at General Term, findings of fact based upon conflicting evidence, in relation to which no exception lies, it must appear by the case that the whole evidence is contained therein.

Where, however, an exception is filed to a finding of fact, as its only purpose is to bring up the question of law that there is no evidence tending to sustain the finding, it is for the respondent to see that all the evidence which tends in any way to support it, is contained in the case, and the question of law may be reviewed here without the statement in the case that it contains all the evidence.

(Argued December 19, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 27, 1889, which modified and affirmed as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiff, individually and as assignee, for the benefit of creditors of the firm of Sheldon & Lawlover, to recover from the executor of Augustus Sherman, deceased, the value of certain accounts, which, plaintiff

alleged, before the assignment, said firm had assigned and transferred to said Sherman in payment or as security for an individual debt of said Lawlover.

The court here say there is no evidence in the case showing either that the accounts so alleged to have been transferred were the property of the said firm or that they had been transferred by it or by Lawlover to Sherman.

The following is an extract from the opinion :

"This case does not state that the whole evidence is contained therein. This is necessary when the appellant intends to review before the General Term findings of fact based upon conflicting evidence, in relation to which no exception lies. In such a case we affirmed the propriety of the rule adopted in the Supreme Court, which refused to review questions of fact based upon conflicting evidence, unless the case contained the statement that all the evidence was returned. We affirmed the Supreme Court in such practice both because we thought it right and because the question more immediately concerned that court. (*Porter v. Smith*, 107 N. Y. 531.) But an exception filed to a finding of fact can only mean that it is intended to bring up the question of law, that there is not any evidence tending to sustain the finding. In that event it behooves the respondent to see to it that all the evidence which tends in any way to support such finding is contained in the case, and we can review the question of law raised by the exception, without the statement that the case contains all the evidence. This is said in response to the claim of the counsel for respondent that, as the case herein does not contain such statement, it will be presumed there was other and sufficient evidence given on the trial to support the finding of fact."

Esek Cowen for appellant.

L. H. Northup for respondent.

PECKHAM, J., reads for reversal and new trial.

All concur.

Judgment reversed.

FANNY J. BENT, as Administratrix, etc., Appellant, v. MARY E. BENT et al., Respondents.

(Argued December 19, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 14, 1888, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

Elon R. Brown for appellant.

John C. Trolan for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. HENRY LANZANDOEN, Appellant, v. FRANK G. SCHIRMER, Sheriff, etc., Respondent.

(Submitted December 20, 1889; decided January 14, 1890.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 9, 1889, which affirmed an order dismissing proceedings on habeas corpus, and remanding the relator to the custody of defendant to serve out a criminal sentence.

Walter J. Donohue for appellant.

Nelson H. Baker for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

119a 626
142 515

FRANK E. MAXIM, Respondent, v. THE TOWN OF CHAMPION,
Appellant.

(Argued December 20, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 13, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

D. G. Griffin for appellant.

Geo. S. Hooker for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

119b 626
150 222

RUDOLPH C. DALZELL, Respondent, v. THE LONG ISLAND
RAILROAD COMPANY, Appellant.

Where, upon inspection of the record filed in this court, in an action tried by a jury, it appears that the case presents no question of law that can be reviewed, the appeal will be dismissed on motion.

(Argued January 13, 1890; decided January 21, 1890.)

MOTION to dismiss appeal from judgment of the General Term of the Supreme Court in the second judicial department, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The following is the *mem.* of opinion.

"The plaintiff brought this action to recover damages for personal injuries sustained by reason of defendant's negligence on the 27th day of December, 1887, while he was being carried over defendant's road as a passenger.

"That the plaintiff sustained some injury for which the defendant is liable to respond in damages to some amount

is not denied, but, on the contrary, was admitted by defendant's counsel at the trial.

"The only question actually litigated was in regard to the character and extent of the injury, and the amount of damages the plaintiff ought to recover.

"The jury rendered a verdict for the plaintiff for \$10,000. A motion for a new trial was denied at the circuit, and the judgment has been affirmed by the General Term in the second department, and the defendant has appealed to this court.

"We have looked into the record and find that no exception was taken at the trial. It is certainly clear that no questions for review are here presented. When upon an inspection of the record, filed in this court, it appears that the case does not present any question of law that can be reviewed, the appeal ought to be dismissed.

"The appeal in this case should be dismissed, with costs."

William W. MacFarland for motion.

E. B. Hinsdale opposed.

O'BRIEN, J. reads *mem.* for granting motion.

All concur.

Appeal dismissed.

GEORGE HOTIS, Appellant, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

(Argued January 13, 1890 ; decided January 21, 1890.)

MOTION for leave to discontinue appeal.

Amasa J. Parker, Jr., for motion.

Hamilton Harris opposed.

Agree to grant motion ; no opinion.

All concur.

Motion granted.

CHARLES RAHT, as Executor, etc., v. HENRY Y. ATTRILL et al.

(Argued January 18, 1890; decided January 28, 1890.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made June 28, 1889, which affirmed an order of Special Term confirming the report of a referee appointed to take proof and pass upon a claim.

Lewis Sanders for appellant.

William W. MacFarland for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

119b628
151 20

In the Matter of the Petition of JOHN CULLEN to Vacate an Assessment for Regulating, etc., First Avenue in the City of New York, from Ninety-second to One Hundred and Ninth Streets.

(Argued January 18, 1890; decided January 28, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made July 9, 1889, which modified, and affirmed as modified, an order of Special Term reducing an assessment.

Charles E. Miller for appellant.

David J. Dean for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

GEORGE J. HUBBARD, Respondent, *v.* WILLIAM H. NEARPASS
et al., as Administrators, etc., Appellants

(Argued January 13, 1890; decided January 28, 1890.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made May 13, 1889, which affirmed an order of Special Term vacating an order for the examination of plaintiff as a witness before trial.

Lewis E. Carr for appellants.

John W. Lyon for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

In the Matter of the Application of JAMES M. CLARK et al.,
to Appraise Damages Sustained, etc., Respondents, *v.* THE
WATER COMMISSIONERS OF AMSTERDAM, Appellant.

(Argued January 13, 1890; decided January 28, 1890.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 7, 1889, which affirmed an order of Special Term confirming the report of commissioners of assessment herein.

J. B. Perkins for appellant.

Robert J. Sanson for respondents.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

THE PEOPLE ex rel. THOMAS SHERIDAN, Appellant, v. STEPHEN B. FRENCH et al., Commissioners, etc., Board of Police of New York City, Respondents.

(Submitted January 18, 1890; decided January 28, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 9, 1884, which affirmed an order of Special Term denying a motion for a peremptory mandamus.

William L. Snyder for appellant.

David J. Dean for respondents.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

GEORGE MUNRO, Respondent, v. ORMOND G. SMITH et al., Appellants.

(Submitted January 18, 1890; decided January 28, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made July 9, 1889, which reversed an order of Special Term granting plaintiff an extra allowance.

Archibald L. Sessions for appellants.

Roger Foster for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

THOMAS J. CALVIN, Respondent, v. THE CITY OF BROOKLYN, Appellant.

THIS case presented the same questions, and was argued and decided with *Harrigan v. City of Brooklyn* (*ante*, p. 156).

WALTER M. MCKINNEY, an Infant, etc., Respondent, *v.* THE
LONG ISLAND RAILROAD COMPANY, Appellant.

(Argued January 14, 1890; decided January 28, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made on the second Monday of May, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict.

E. B. Hinsdale for appellant.

J. Stewart Ross for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ROSE ACKER, Appellant, *v.* THE TOWN OF NEW CASTLE,
Respondent.

(Argued January 28, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 14, 1888, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

John Gibney for appellant.

Odle Close for respondent.

Dismissed on argument.

HELEN JULIA OSZKOSCIL, an Infant, by Guardian, etc., Appellant, *v.* THE EAGLE PENCIL COMPANY, Respondent.

(Argued January 15, 1890; decided January 31, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an

order made May 7, 1889, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at circuit.

Samuel Greenbaum for appellant.

Mr. Stine for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

NAPOLEON J. HAINES, Respondent, *v.* JOHN H. DEMOTT et al.,
Appellants.

(Argued January 24, 1890; decided January 31, 1890.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made May 16, 1888, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

William Fullerton for appellants.

John H. V. Arnold for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

CHARLES WERNER et al., Appellants, *v.* MINNA G. TUCH et al.,
Respondents.

On an appeal in an action for the foreclosure of a mortgage, an undertaking against waste and for the value of the use and occupation of the mortgaged premises operates as a stay of proceedings, without a covenant to pay a deficiency, and it is optional with the appellant which form of undertaking he will give. (Code Civ. Pro. § 1331.)

(Submitted January 27, 1890; decided January 31, 1890.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made September 10, 1889, which affirmed an order of the Special Term staying proceedings in the above entitled action.

The following is the *mem.* of opinion :

“The construction of section 1331 of the Code of Civil Procedure adopted in *Grow v. Garlock* (29 Hun, 598), which, on an appeal in foreclosure cases, holds that an undertaking against waste and for the value of use and occupation operates as a stay of proceedings without a covenant to pay a deficiency, and that the appellant may choose to give either form of the undertaking with equal effect, is approved for the reasons there given.

“The order should, therefore, be affirmed, with costs.”

Simpson & Werner for appellants.

Reynolds, Stanchfield & Collin for respondents.

Per Curiam opinion for affirmance.

All concur.

Order affirmed.

THE NEW YORK RUBBER COMPANY, Appellant, v. JOHN ROTHERY et al., Respondents.

(Argued January 27, 1890; decided January 31, 1890.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made June 28, 1889, which affirmed an order of Special Term denying a motion for a resettlement of the case.

On appeal from a former order denying a motion to resettle the case herein (112 N. Y. 592), this court reversed the order and granted the motion. •

The case was brought before the trial court who again refused to resettle it, basing the refusal upon what it describes in its order as an insertion of the “actual history” of the

matter in regard to which it was sought to have the case amended.

The court here hold that there is nothing in the "history" inconsistent with or contradictory of the fact upon which the prior decision was based.

Austen G. Fox for appellant.

H. H. Hustis for respondent.

GRAY, J., reads for reversal of orders of Special and General Term, and for granting the motion.

All concur.

Ordered accordingly.

WILLIAM H. HOLLISTER, Respondent, *v.* THE CENTRAL
NATIONAL BANK OF TROY, Appellant.

(Argued January 16, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made March 16, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict.

Orin Gamble for appellant.

N. Davenport for respondent.

Agree to affirm.

The following *mem.* being handed down :

"This case was argued in connection with the case of *Ouderkirk v. Central National Bank of Troy* * and is substantially similar to that case in its facts. Some differences exist in minor details, but none in the material facts controlling the decision, and the judgment should, therefore, be affirmed upon the authority of that case."

All concur, GRAY, J., in result.

Judgment affirmed.

* *Ante*, p. 263.

TERESA LYNCH, Respondent, v. THE FIRST NATIONAL BANK
OF JERSEY CITY, Appellant.

(Argued January 20, 1890 ; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made July 9, 1889, which reversed a judgment in favor of defendant and granted a new trial.

Agree to affirm. Order and judgment absolute ordered on stipulation, with costs.

Hamilton Wallis for appellant.

Abram Kling for respondent.

Agree to affirm ; no opinion.

All concur, except FINCH and GRAY, JJ., dissenting.

Judgment accordingly.

HARRIET BEAL, Appellant, v. THE NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY, Respondent.

(Argued January 21, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 1, 1886, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial without a jury.

C. W. White for appellant.

C. D. Prescott for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. PATRICK VAUGHAN et al., Appellants, v.
THE BOARD OF SUPERVISORS OF RENSSELAER COUNTY,
Respondent.

(Argued January 21, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 8, 1889, which affirmed a judgment in favor of defendant entered upon an order dismissing the proceeding on trial at Circuit.

James Lansing for appellants.

R. A. Parmenter for respondent.

Agree to affirm ; no opinion.

All concur, except RUGER Ch. J., not voting.

Judgment affirmed.

MARY COSTELLO, Respondent, v. THE SECOND AVENUE
RAILROAD COMPANY, Appellant.

(Argued January 24, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made May 10, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Waldo Hutchins, Jr., for appellant.

George Washbourne Smith for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THOMAS O. BULLOCK et al., Appellants, v. A. W. OPPMANN
et al., Respondents.

(Argued January 24, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 23, 1888, which affirmed a judgment in favor of defendants entered upon a verdict, and affirmed an order denying a motion for a new trial.

William A. Abbott for appellants.

William H. Townley for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

In the Matter of the Petition of JOHN NEWTON, Commissioner
of Public Works.

(Argued January 27, 1890; decided February 25, 1890.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made September 10, 1889, which affirmed an order of Special Term affirming a taxation of allowance for counsel fees.

Nelson J. Waterbury for appellants.

David J. Dean for respondent.

Agree to dismiss, on the ground that the order is discretionary ; no opinion.

All concur.

Appeal dismissed.

RICHARD G. BERFORD, Appellant, *v.* WILLIAM L. WETMORE
et al., Impleaded, etc., Respondents.

(Submitted January 27, 1890; decided February 25, 1890.)

APPEAL from an order of the General Term of the Superior Court of the city of New York, made April 19, 1889, which affirmed an order of Special Term vacating an order for service of summons without the state.

Roger M. Sherman for appellant.

Barlow & Wetmore for respondents.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

JOSEPH TAYLOR, Appellant, *v.* CHARLES HALL, Respondent.

(Argued January 27, 1890; decided February 25, 1890.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made November 13, 1888, which reversed an order of Special Term denying a motion to set aside an execution and granted said motion.

Willam H. Gilman for appellant.

D. C. Barnum for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

ULRICE LESSER, Appellant, v. SARAH A. WILLIAMS,
Respondent.

(Submitted January 27, 1890 ; decided February 25, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 29, 1889 which affirmed an order of Special Term changing the place of trial.

M. A. Lesser for appellant.

Riley & Conway for respondent

Agree to affirm ; no opinion.

All concur.

Order affirmed.

GEORGE L. WHITMAN et al. v. JOHN R. HAINES et al.

BENJAMIN KNOWER et al. v. JOHN R. HAINES et al.

FRANCIS M. BACON et al. v. JOHN R. HAINES et al.

JULIUS BALLIN et al. v. JOHN R. HAINES et al.

HENRY A. GOWING et al. v. JOHN R. HAINES et al.

In the Matter of the Application of GEORGE L. WHITMAN et al. to Punish GEORGE W. SCHAFFER, Appellant, as for a Contempt.

(Submitted January 27, 1890 ; decided February 25, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made November 12, 1888, which affirmed an order of Special Term, punishing the appellant as for a contempt.

Sidney H. Stuart for appellant.

Henry Stanton for respondents.

Agree to affirm on opinion below

All concur.

Order affirmed.

THOMAS E. KANE, Respondent, *v.* THE CITY OF TROY,
Appellant.

(Submitted January 28, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 17, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

R. A. Parmenter for appellant.

Levi Smith for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

DANIEL MAGEE, Respondent, *v.* THE CITY OF TROY,
Appellant.

(Argued January 28, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 17, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict.

R. A. Parmenter for appellant.

Charles E. Patterson for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ADOLPH PROCHOWNICK et al., Appellants, v. EUGENE S. BOYD
et al., Respondents.

(Submitted January 29, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 14, 1888, which affirmed a judgment in favor of defendants entered upon a verdict and affirmed an order denying a motion for a new trial.

Nathan Bijur for appellants.

David Barnett for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

FRANCIS B. THURBER et al., Respondents, v. JOHN STIMMEL,
Appellant.

(Argued January 31, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 18, 1888, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

This action was brought to recover a surplus arising on sale under a chattel mortgage. Plaintiffs claimed the balance as subsequent incumbrancers. The question litigated was simply as to the amount of defendant's claim.

The court here say : "The facts stated by the judge clearly warrant his conclusion of law in favor of the claim of plaintiffs. The only question for us is whether there is any evidence in the case upon which the finding can be based ; a careful perusal of the evidence brings us to the conclusion that there is."

Abner C. Thomas for appellant.

, *E. More* for respondents.

PECKHAM, J., reads *mem.* for affirmance.

All concur.

Judgment affirmed.

119	642
158	823
119	642
d154	481

In the Matter of the Judicial Settlement of the Account of
JAMES WILEY, as General Guardian, etc.

Under the provisions of the Code of Civil Procedure (§ 2606), conferring upon the Surrogate's Court jurisdiction on death of a guardian, executor or administrator, to require his executor or administrator to account for and deliver over the trust estate the same as it would have against the decedent, if his letters had been revoked in his life-time, his representative, as soon as appointed, stands in his place for the purpose of such accounting and delivery, and the application therefor may be made immediately upon such appointment.

(Argued February 24, 1890; decided March 4, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 2, 1889, which affirmed an order of the surrogate directing an accounting by the administratrix of James Wiley, deceased, of the trust estate in his hands at the time of his decease, as general guardian of Emily L. Middleton.

The following is the *mem.* of opinion:

"The case of *In re Accounting of Clark as Executor of Fithian* has just been decided by this court, and not yet reported.*

"In that case Clark, the executor of Fithian, died, and Clark's executrix had been appointed but the day before the filing of the petition of Mrs. Fithian to compel such executrix to show cause why the account of Clark as the executor of Fithian should not be rendered and settled.

"We held that the section (2606) of the Code gave the surrogate jurisdiction upon the death of an executor to require

**Ante*, p. 427.

his executor or administrator to account for and deliver over the trust estate precisely as if the letters of the deceased executor had been revoked in his life-time, and he had been called upon to deliver up the assets, and that his representative stood in his place for the purpose of such accounting and delivery.

“While the question of the precise time, within which such accounting could be demanded, was not raised in that case, yet we are of the opinion that the true construction of the section permits the application to be made immediately upon the appointment of the executor of the guardian or administrator, etc.

“This leads to an affirmance of the order.”

William J. Lynch for appellant.

Edward C. Perkins for respondent.

Per curiam opinion for affirmance.

All concur except GRAY, J., not sitting.

Order affirmed.

WILLIAM P. PICKETT, as Assignee, etc., Appellant, *v.* ADA F. M. GOLLNER, Respondent.

(Argued February 24, 1890; decided March 4, 1890.)

MOTION to dismiss appeal from judgment of the General Term of the City Court of Brooklyn, entered upon an order made November 1, 1889, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury. The motion was based on the ground that the amount in controversy was less than \$500.

Herman F. Koeppe for motion.

Alfred R. Page opposed.

Agree to grant motion ; no opinion.

All concur.

Appeal dismissed.

EDGAR C. DAVIS, Respondent, *v.* THE ROME, WATERTOWN
AND OGDENSBURG RAILROAD COMPANY, Appellant.

BYRON H. GARLAND, Respondent, *v.* THE SAME, Appellant.

ELISHA GARRISON, Respondent, *v.* THE SAME, Appellant.

(Argued February 24, 1890; decided March 11, 1890.)

APPEAL from orders of the General Term of the Supreme Court in the fourth judicial department, made May 10, 1889, which affirmed orders of Special Term requiring defendant in each case to furnish the plaintiff a bill of particulars of a counter-claim.

Charles J. Babbitt for appellant.

Stone, Gannon and Petit for respondents.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

ROLLIN TRACEY, Respondent, *v.* MATTHEW BYRNES, Appellant.

(Argued February 24, 1890; decided March 11, 1890.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made November 4, 1889, which affirmed an order of Special Term requiring plaintiff to serve upon defendant a bill of particulars.

Samuel J. Crooks for appellant.

W. O. Campbell for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

FIRST NATIONAL BANK OF MARIETTA, PA., Respondent, *v.*
THE BUSHWICK CHEMICAL WORKS, Appellant.

(Submitted February 24, 1890; decided March 11, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made July 15, 1889, which affirmed an order of Special Term denying a motion to vacate an attachment.

Edward B. Whitney for appellant.

C. Bainbridge Smith for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

AUGUSTA G. GENET, Respondent, *v.* THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY, Appellant.

(Argued February 24, 1890; decided March 11, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 2, 1889, which denied a motion to dismiss an appeal by plaintiff from a judgment partly in her favor entered upon the report of a referee.

Frank E. Smith for appellant.

George C. Genet for respondent.

Agree to affirm ; no opinion.

All concur except PECKHAM, J., not sitting.

Order affirmed.

In the Matter of the Application of WILLIAM VANAMEE, as
Receiver, etc.

(Submitted February 24, 1890; decided March 11, 1890.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 20, 1889, which reversed an order of Special Term denying the application of William Vanamee, as receiver of the Warwick Machine Company, for a warrant to examine William T. Baird.

Alfred Ely for appellant.

Willard N. Baylis for respondent.

Agree to affirm, on the ground that the attorney-general should have had notice of the application; no opinion.

All concur.

Order affirmed.

119b646
154 811
119b646
162 220

CHARLES W. DOHERTY et al., Respondents, v. GEORGE W.
MATSELL, JR., et al., Appellants.

Possession of land is always presumed to be in subordination to the true title, and one who claims to have acquired title by adverse possession must show that he or his predecessors in interest held the land in hostility to the true owner claiming the title thereto.

(Argued March 7, 1890; decided March 11, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 20, 1888, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial without a jury.

This was an action to recover possession of certain real estate in New York city commenced in October, 1883. It appeared that on September 25, 1848, in pursuance of a sale for unpaid taxes, a lease of said land, which was subsequently held to be void, was executed by the city to one Matsell for a term of

twenty-five years, which recited that the lessee was entitled to hold the land against the owner or owners and al^l claiming under him until the expiration of his term, and that he could remove all buildings erected by him on said land. Matsell took possession of the land and erected buildings which he occupied until February 28, 1857, when he executed a quit-claim deed thereof to one Mickle, and at the same time assigned to him the tax lease. Mickle occupied the land and received the rents until in 1858, when Matsell again resumed possession without, so far as appeared, any reconveyance or reassignment of the lease, and he continued to occupy the land and receive the rents until November 1, 1864, when he conveyed by a quit-claim deed to his son, one of the defendants, who has since occupied and possessed the premises. On April 30, 1883, the owner, for whose failure to pay taxes the sale was made, conveyed said land to Charles Jones, for whose benefit this action was brought. There was no evidence that Mickle or Matsell, prior to November 1, 1864, claimed any title to the land except under the lease, or did any act inconsistent with a claim of right under the lease. Defendant set up a title by adverse possession.

The court say: "It is undoubtedly true that for irregularities in the imposition of the taxes and in the proceedings leading to the tax sale the lease was void. But Matsell entered under the lease, and his right to hold under it does not appear ever to have been disputed. While under such a lease he was not estopped from disputing the title of the real owners, and while during the term he could have originated an adverse possession, yet he did not do so; and the lease although void was competent and persuasive evidence that he entered into and held possession of the land under the lease, and that he claimed no other title thereto. In order to establish title by adverse possession, it was incumbent upon the defendants to show that they and their grantors held the land adversely and in hostility to the true owner, claiming the entire title thereto. (*Hoyt v. Dillon*, 19 Barb. 644; *St. Vincent Orphan Asylum v. City of Troy*, 76 N. Y. 108; *Gross v. Welwood*, 90 id. 638; *Sands v. Hughes*, 53 id. 287.)

“ Possession of land is always presumed to be in subordination to the true title, and one who claims that it is in hostility to such title must give evidence showing that fact or from which the fact may properly be inferred.

“ Here the evidence and circumstances were ample to justify a finding that Matsell, Sr., never, during the time he possessed the land, claimed to own anything more than the estate which the lease purported to give him, and that the land was never possessed adversely and in hostility to the true owners prior to the 1st day of November, 1864. The quit claim deed to Mickle was an appropriate instrument for the conveyance of Matsell's interest in the term, and the assignment at the same time of the lease, subject to the rents and covenants therein contained, authorizes, if it does not absolutely require, the inference that all that Matsell intended to convey was his term under the lease. The fact that he resumed possession of the premises in 1858, without, so far as it appears, any reconveyance to him, certainly is not conclusive evidence that he intended then to assert an absolute title to the land; but the inference is permissible and most probable that there was either an undisclosed reconveyance to him by Mickle or some arrangement between Mickle and him by which he was to resume his former title. It must be presumed, in the absence of other proof, that he occupied the premises then as he did before the conveyance to Mickle, and as Mickle did. He knew the existence of the lease and that he had no right to occupy the premises except by virtue thereof, and there can be no presumption that he intended without any title or right to acquire by simple possession the title to this land, and thus without a shadow of right deprive the true owners thereof.

“ If the adverse possession of these premises commenced at any time before the expiration of the lease from the city, the evidence authorized a finding that it commenced not earlier than the 1st day of November, 1864, when Matsell conveyed to his son. The defendants admit that at the time of the conveyance of the land to Charles Jones they claimed the adverse possession under that title, and, therefore, it was proper that this action should be commenced in the name of

the grantors for the benefit of their grantee, under section 1501 of the Code.

“The case of *Sands v. Hughes* (*supra*) is not an authority for the defendants. That case holds that a lessee under such a lease is not estopped from disputing the title of the supposed owner for whose default, in the payment of the taxes, the land was sold by the city, and that, during the term of such a lease, even if valid, an adverse possession may be originated which will ripen into a title within twenty years after the end of the term; and that if the lease is invalid an adverse possession may originate and commence to run at any time which will ripen into a title within twenty years from the time it originated. There the adverse possession under claim of title was found. But the difficulty with the case of the defendants here is that there is no evidence requiring or finding that Mickle or George W. Matsell ever originated an adverse possession or claimed an adverse title earlier than the 1st of November, 1864, and the defendants, therefore, failed at the trial, as they must fail here, on the ground that they did not establish the adverse possession upon which they seek to base their title. But for the lease the evidence was ample to show the adverse possession. But the existence of that, whether valid or invalid, and the entry thereunder characterizes the possession, and must properly dominate this case.

“We are, therefore, of opinion that the judgment should be affirmed, with costs.”

Emanuel J. Myers for appellants.

Alex. Thain for respondents.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

SICKELS—VOL. LXXIV. 82

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
JOHN PRICE, Appellant.

(Argued February 26, 1890; decided March 18, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 6, 1889, which affirmed a judgment entered upon a verdict convicting the defendant of grand larceny.

Peter Mitchell for appellant.

Hugh Reilly for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

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ELIZABETH GOODYEAR, as Administratrix, etc., Appellant, v.
JOHN B. ADAMS et al., Impleaded, etc., Respondents.

(Argued February 26, 1890; decided March 18, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 30, 1889, which affirmed a judgment in favor of defendants entered upon the report of a referee.

S. Mack Smith for appellant.

S. C. Millard for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

LOUIS BAJUS, Appellant, *v.* THE SYRACUSE, BINGHAMTON AND
NEW YORK RAILROAD COMPANY, Respondent.

(Argued February 27, 1890; decided March 18, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 19, 1889, which affirmed a judgment in favor of defendant entered upon an order nonsuiting plaintiff on trial.

W. R. Goodelle, for appellant.

Louis Marshall for respondent.

Agree to affirm ; no opinion.

All concur, excepting RUGER, Ch. J., not sitting, and
ANDREWS, J., not voting.

Judgment affirmed.

EDWIN McDONALD, Appellant, *v.* ABRAM T. VAN HORNE,
Committee, etc., Respondent.

(Argued January 14, 1890; decided March 18, 1890.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made November 9, 1886, which affirmed an order of the County Court of Otsego county, punishing plaintiff for contempt of court.

R. M. Townsend for appellant.

James A. Lynes for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

CHARLES JANSEN, Respondent, *v.* THE OTTO STIETZ NEW
YORK GLASS LETTER COMPANY, Appellant.

(Submitted February 28, 1890; decided March 18, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 19, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

Edward P. Wilder for appellant.

Rufus L. Scott for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JOHN CONSALUS, Appellant, *v.* ISAAC MCCONIHIE et al.,
Respondents.

(Argued February 28, 1890; decided March 18, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 31, 1888, which affirmed a judgment in favor of the defendant, Isaac McConihe, entered upon the report of a referee.

E. F. Bullard for appellant.

Orin Gambell for respondent.

Agree to affirm on opinion of LANDON, J., below.

All concur.

Judgment affirmed.

EDGAR E. COOK, Respondent, *v.* THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

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(Argued March 4, 1890; decided March 18, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

Albert H. Harris for appellant.

Safford E. North for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ROBERT ROGERS, Individually, etc., Respondent, *v.* THE NEW YORK LIFE INSURANCE AND TRUST COMPANY, in its own behalf and as General Guardian, etc., Impleaded, etc., Appellant.

(Submitted March 4, 1890; decided March 18, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 14, 1888, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

R. E. Robinson for appellant.

A. H. F. Seeger for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

WILLIAM B. MEEKER et al., Respondents, *v.* ABRAM H. DAYTON, Appellant.

(Argued March 4, 1890; decided March 18, 1890.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made May 14, 1888, which affirmed a judgment in favor of plaintiffs entered upon the report of a referee.

Alfred P. W. Seaman for appellant.

E. Willard Roby for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. NATHAN B. WARREN et al., Respondents, *v.* EDWARD CARTER et al., Appellants.

In proceedings under the act of 1880 (Chap. 269, Laws of 1880), to review an assessment, where it appears to the court that the assessors have acted "with gross negligence," costs may be awarded against them.

THIS case presented the same questions and was argued and decided with *People ex rel. v. Carter* (*ante*, p. 557).

The additional question was presented here as to the right to allow costs against defendants. As to this the court say : "The court having found that the assessors acted with gross negligence in assessing the property at \$50,000 in 1888, was authorized by the statute (§ 6) to impose costs upon them."

TIMOTHY H. TEALL, Respondent, *v.* THE CONSOLIDATED ELECTRIC LIGHT COMPANY, Appellant.

Where a trial court makes a correct ruling upon an erroneous theory, or assumption, no error is committed authorizing a reversal.

In an action against a corporation upon an alleged contract, the making of the contract was expressly admitted by the answer and an affirmative defense set up. On the trial the admission in the pleading was not

alluded to, but plaintiff gave proof of the execution of the contract by one of defendant's officers. The court directed a verdict for plaintiff. *Held*, that although the court might have been in error in holding the contract proved, plaintiff had the right to avail himself of the admission, to sustain the ruling on appeal, even if it was not taken into consideration by the court below.

It seems that if the case had been submitted to the jury upon the evidence, and they had rendered a verdict for defendant, plaintiff, having acted upon the theory that the contract was in issue, could not, upon appeal or motion to set aside the verdict, have relied upon the admission.

(Argued March 13, 1890; decided March 18, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 13, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

The complaint in this action alleged the making of a contract by defendant, "through its duly authorized acting officer and agent," with plaintiff, for the performance of certain services by the latter; that he entered upon the performance of such duties and incurred therein certain expenses. Plaintiff claimed to recover for the service and expenses. The first paragraph of the answer which was verified admitted "that a contract or agreement was made between the parties in form as stated in the complaint," but denied that plaintiff rendered any services thereunder. The second paragraph of the answer denied that "the contract in suit" was made through any authorized officer or agent of defendant, and avers that it was "executed on the part of this defendant" by an officer without authority, and by a mutual mistake. There was no direct denial that such contract was in some way, by ratification or otherwise, made. Defendant gave no evidence on the trial of the affirmative defense set out in the second paragraph of its answer. Plaintiff's counsel did not, upon the trial, allude to the admission of the contract contained in the answer, but gave evidence of its actual execution. The trial court ordered a verdict for plaintiff, but did not allude to the admission in the answer.

The court here say:

"The plaintiff had the right to start upon the trial with his contract distinctly and clearly admitted, and it rested upon

the defendant to prove the matters alleged in the second portion of the answer to avoid the binding obligations thereof. The trial judge, therefore, committed no error in holding that the contract was conclusively established.

“It is true that at the trial the plaintiff’s counsel did not, so far as appears in the record, allude to the admission of the contract contained in the answer, and that he gave evidence of the actual execution of the contract, and when the trial judge ordered a verdict for the plaintiff it does not appear that he took any notice of the admission in the answer, and he may have acted entirely upon the evidence. But in holding that the contract was established, even if he did not take into account the admission in the answer, but made a right ruling upon an erroneous theory, or upon an erroneous assumption, he committed no error for which his decision could be reversed. If, however, the case had been submitted to the jury upon the evidence and they had rendered a verdict for the defendant, it is quite probable that the plaintiff could not upon appeal, or upon a motion to set aside the verdict, have relied upon the admission in the answer which was not called to the attention of the court or the opposite party at the trial. In such a case, if the plaintiff at the trial acted upon the theory, and permitted the defendant and the court to act upon the theory, that the contract was in issue, he would not be permitted to change his position after verdict. But here this court is asked to reverse a judgment which is absolutely right upon an express admission made in the answer, and with that admission, there certainly can be no allegation of error.

“The defendant upon the trial, gave no evidence of the affirmative defense set out in the second portion of the answer. It is undisputed in the evidence that the plaintiff entered upon the performance of his contract and thereafter acted under the direction of defendant’s officers, and performed the very services mentioned in the contract, and there is no proof whatever, that he neglected or refused to perform any part of the contract, and therefore, there was nothing in reference to his performance for submission to the jury.”

Charles C. Bull for appellant.

George H. Sears for respondent.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

MARY J. WILDRICK, as Executrix, etc., Appellant, v. DEWITT
C. HAGER et al., Respondents.

(Argued March 5, 1890; decided March 21, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 21, 1887, which affirmed a judgment in favor of defendants entered upon the report of a referee.

J. W. Dininny for appellant.

D. M. Darrin for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

CHARLES F. KING, as Receiver, etc., Appellant, v. JOHN H.
WALBRIDGE et al., Respondents.

(Argued March 7, 1890; decided March 21, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 1, 1888, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

L. M. Brown for appellant.

Edgar T. Brackett for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

BENJAMIN FANNING, Respondent, *v.* JOHN W. VROOMAN et al.,
Appellants.

(Argued March 7, 1890; decided March 21, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 17, 1887, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

J. H. Clute for appellants.

L. W. Baxter for respondent.

Agree to confirm ; no opinion.

All concur.

Judgment affirmed.

ALFRED BEINHAUER, Respondent, *v.* AMELIA A. GLEASON,
Impleaded, etc., Appellant.

(Submitted March 7, 1890; decided March 21, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 28, 1888, which modified, and affirmed as modified, a judgment in favor of plaintiff and reversed the same as to certain of the defendants, entered upon a decision of the court on trial at Special Term, and vacated an order staying proceedings.

William Sutphen for appellant.

Philip L. Wilson for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

HENRY RADMAN, Respondent, *v.* JOSEPH L. HABERSTRO,
Appellant.

(Submitted March 7, 1890; decided March 21, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict.

George L. Kingston for appellant.

Wm. Armstrong for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

MARY BEADLESTON, Respondent, *v.* JOHN B. ALLEY et al.,
Respondents, THE UNITED STATES TRUST COMPANY OF NEW
YORK, Appellant.

(Argued March 7, 1890; decided March 21, 1890.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made September 9, 1889, which reversed an order of Special Term setting aside an order of discontinuance.

Edward W. Sheldon for appellant.

Robert G. Ingersoll, H. M. Herman, O. H. LaGrange for
respondents.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

ELIZA GLENN, Respondent, *v.* LOUISE C. BURROWS et al., as
Executors, etc., Appellants.

(Argued March 10, 1890; decided March 21, 1890.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 1, 1889, which affirmed an order of Special Term confirming the report of a referee.

John H. White for appellants.

John Cunneen for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

STEPHEN L. BARTLETT, Appellant, *v.* EDWARD SUTORIUS,
Respondent.

(Argued March 10, 1890; decided March 21, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 13, 1890, which reversed an order of Special Term denying a motion to vacate an order of arrest.

Robert E. Deyo for appellant.

Chas. Stewart Davison for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

In the Matter of the Application of the MAYOR, ALDERMEN
AND COMMONALTY OF THE CITY OF NEW YORK, to Compel an
Accounting by ALFRED L. SIMONSON et al., Executors, etc.

(Argued March 10, 1890; decided March 21, 1890.)

APPEAL from an order of the General Term of the Supreme Court in the first judicial department, made December 2, 1889,

which affirmed an order of the surrogate of the county of New York dismissing petition.

B. E. Valentine for appellant.

Edward Schenck for respondents.

Agree to affirm ; no opinion.

All concur, except O'BRIEN, J., not sitting.

Order affirmed.

In the Matter of the Probate of the Will of ROSALIE
FLORENCE, deceased.

(Argued March 10, 1890; decided March 21, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made November 7, 1889, which affirmed an order of the surrogate of the county of New York, denying a motion to vacate probate of will.

George H. Yeaman for appellant.

Charles E. Miller for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

JOHN J. FINNEY, Respondent, *v.* PETER W. GALLAUDET et al.,
Appellants.

(Submitted March 18, 1890; decided March 21, 1890.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made December 3, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

C. Elliott Minor for appellants.

Edwin M. Felt for respondent.

Per Curiam opinion for affirmance.

All concur.

Judgment affirmed.

JOHN PETERSON, Appellant, *v.* JOHN SWAN, Respondent.

Although a copy of the record has been filed with the clerk of this court, on appeal to it, the court below so far retains jurisdiction of the case as to enable it to make such amendment as it shall deem proper, and to order the amendment to be duly certified to, and filed with the said clerk, and when duly filed, it is to be regarded as part of the original return.

A motion, therefore, to remit for the purpose of permitting the court below to amend the record, if it should desire to do so, is unnecessary and should be denied.

It seems that when a record shows that the order or judgment of the court below appealed from, was by consent or was not an actual determination of that court, an appeal to this court may not be heard.

(Argued March 4, 1890; decided March 21, 1890.)

MOTION to remit return to the court below for amendment.

The following is the opinion in full:

“It has been frequently held by this court that although a copy of the record has been filed with the clerk, pursuant to the notice of appeal, yet, the court below so far retains jurisdiction of the case as to enable it to make such amendment to the record as it shall deem proper, and to order that the amendment shall be duly certified to us and filed with our clerk.

“When thus filed, we regard it as part of the original return and proceed to hear the case as thus prepared. Of course, if the amendment be of such nature as to show that the record as amended, was not before the General Term, we should not hear it, as our jurisdiction is confined to a review of the decisions actually made by that tribunal. (*N. Y. Cable Co. v. Mayor, etc.*, 104 N. Y. 1.)

“The plaintiff’s motion to remit for the purpose of permitting the court below to amend the record, if it should desire to do so, is therefore, unnecessary and must be denied.

“The defendant’s motion for judgment will be held until the first motion day of the coming term, when it may be brought on without further notice. What disposition beneficial to the plaintiff can be then made of the case, it is somewhat difficult to see. If a record show that the order or judgment of a court below was by consent, or was not an actual determination of such court, an appeal to this court could not be heard, for, as already stated, we can not review decisions of the lower courts entered by consent or taken merely *pro forma*, where the record shows such facts.”

Arthur L. Andrews for motion.

Esek Cowen opposed.

PECKHAM, J., reads for denial of motion.

All concur.

Motion denied.

I N D E X .

ABATEMENT AND REVIVAL.

1. *It seems* an action against a director of a corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848) to recover a debt due from the company because of failure of defendant to make and file an annual report as required by the act (§ 12) is a penal action and abates upon the death of either party before verdict. *Curr v. Rischer.* 117
2. But when judgment is rendered, the original wrong is merged therein and the judgment becomes property with all the attributes of a judgment in an action *ex contractu.* *Id.*
3. The action, therefore, does not absolutely abate upon death of the defendant after judgment. *Id.*
4. Nor does a reversal of the judgment by the General Term strike it out of existence for every purpose; although a new trial may not be had, the judgment may be restored on appeal to this court and the action may be continued for that purpose. *Id.*
5. *It seems* in case the death occurs after appeal to this court from an order of the General Term reversing the judgment, and the legal representatives of the decedent are not substituted, this court must take action as prescribed by the Code of Civil Procedure (§ 1298) where either party dies pending an appeal. *Id.*
6. Under the provision of the act of 1875, providing for the organization of certain business corporations (§ 37, chap. 611, Laws of 1875), which makes the stockholders "in limited liability companies" individually liable "to an amount equal to the amount of stock held by them respectively"

for all the debts of the company, until the whole amount of capital stock has been paid in and a certificate thereof made and recorded, the liability so imposed is not penal, but is in the nature of a contract obligation, and so it survives the death of a stockholder, and continues against his personal representatives. The statutory obligation which the stockholder assumes when he becomes such, is inherent in, and becomes part of every contract made by the corporation with the creditors prior to the time that the certificate required is filed. *Cochran v. Wiechers.* 399

ACCORD AND SATISFACTION.

A substituted parol agreement followed by actual performance, whether made and executed before or after breach of a covenant in the original contract, is a good accord and satisfaction of the covenant. So, also, a new agreement, although without performance, if based on a good consideration, will be a satisfaction if accepted as such. *McCreery v. Day.* 1

ACCOUNTING.

Under the provisions of the Code of Civil Procedure (§ 2606), conferring upon the Surrogate's Court jurisdiction on death of a guardian, executor or administrator, to require his executor or administrator to account for and deliver over the trust estate the same as it would have against the decedent, if his letters had been revoked in his life-time, his representative, as soon as appointed, stands in his place for the purpose of such accounting and delivery, and the application therefor may be made immediately upon such appointment. *In re Wiley.* 642

—As to power of surrogate in proceedings for an accounting by executor or administrator of deceased executor, as to trust funds.

See *In re Clark*.

427

ADMISSIONS AND DECLARATIONS.

1. On trial of an action to set aside an instrument on the ground of conspiracy and fraud, in the absence of any proof connecting a person not a party to the action with the alleged conspiracy, his acts or declarations are immaterial and inadmissible; to make them competent, *prima facie* evidence must first be given of the existence of the conspiracy, and of the connection of the person whose acts and declarations are sought to be proved. *Rutherford v. Schattman*. 604

2. Where the probate of a will was contested upon the ground that the instrument was fabricated after the death of the testator by O., one of the witnesses thereto, and the proof on the part of the contestants consisted mainly of acts and declarations of O., who had died prior to the trial, tending to show that the testator died intestate, and that O. fabricated the instrument, *held*, it was competent to prove declarations of O., during the life of the testator, to the effect that he had made a will. *In re Hesdra*. 615

ADVERSE POSSESSION

Possession of land is always presumed to be in subordination to the true title, and one who claims to have acquired title by adverse possession, must show that he or his predecessors in interest held the land in hostility to the true owner claiming the title thereto. *Doherty v. Matsell*. 646

ALIMONY.

1. In an action for divorce, brought by the wife, a motion for a temporary allowance and counsel fee was denied by the Special Term,

on the ground that final judgment had been rendered for plaintiff, awarding her alimony and costs, and that, although the defendant had appealed therefrom and procured a stay, and the wife had no means of support or for defending the appeal, yet the court was without power to grant the relief desired. This order was reversed by the General Term, and the case remitted to the Special Term for a decision on the merits. *Held*, that the order of the General Term was not final, and so was not appealable to this court. *McBride v. McBride*. 519

2. *It seems*, that power exists in such a case to make the allowance sought during the pendency of the appeal from the judgment and until the final determination of the action. (Code Civ. Pro. § 1769.) *Id.*

3. *It seems*, also, that the court below, in the exercise of its discretion, may and should require, as a condition of the allowance, that plaintiff stipulate that the sums allowed shall, in case of an affirmance of the judgment, be applied by her as payment *pro tanto* thereon. *Id.*

AMENDMENT.

1. In an action upon an alleged contract to pay a sum specified for services rendered, the issue was as to the terms of the contract, it being conceded that if plaintiff was entitled to recover anything, it was the amount claimed, with interest. The court so charged, stating the precise sum plaintiff was entitled to, if the jury found a verdict in his favor. On adjournment of the court for the day, pursuant to stipulation of counsel, the jury were informed that they might seal their verdict; that they need not return in the morning to deliver it, but could deliver it to the officer in charge. The sealed verdict simply stated that the jury found for plaintiff. Upon reading the verdict the court stated it was a mistrial; no order setting aside the verdict was entered. At the same term a motion was made to amend the

verdict, on an order to show cause, granted three days after the verdict, and on affidavits of the jurymen, to the effect that they all agreed upon a verdict for the full amount claimed, but being uncertain as to the exact amount stated by the court, signed the verdict supposing the amount would be inserted; the court amended the verdict by inserting the amount. *Held*, no error; that the court had the power to make the amendment and in exercising its discretion was guilty of no abuse thereof. *Hodgkins v. Mead.* 166

2. Although a copy of the record has been filed with the clerk of this court, on appeal to it, the court below so far retains jurisdiction of the case as to enable it to make such amendment as it shall deem proper, and to order the amendment to be duly certified to, and filed with the said clerk, and when duly filed, it is to be regarded as a part of the original return. *Peterson v. Swan.* 662
3. A motion, therefore, to remit for the purpose of permitting the court below to amend the record, if it should desire to do so, is unnecessary and should be denied. *Id.*

ANNUITIES.

The will of K. gave her residuary estate to her executors in trust, to receive rents, profits and income, and after paying therefrom certain specific annuities, among them one of \$500 to D., her adopted son, for his support during minority, and \$1,000 thereafter during the life of her husband, to apply the balance to the use of her husband during his life. After his death to pay to D. \$2,000 per annum during his life. D. survived the husband, and for a number of years after the death of the latter the annual income was insufficient to pay the said annuity in full. Subsequently it exceeded that amount. Upon a settlement of the accounts of the trustee, *held*, that, in the absence of any language in the will showing a different intent, D. was entitled to have the surplus applied in the

first instance to the satisfaction of deficiencies in the annuity for the years it was not paid in full. *In re Chauncey.* 77

APPEAL.

1. Where, after judgment in a penal action, the defendant dies, a reversal of the judgment of the General Term strikes it out of existence for every purpose; although a new trial may not be had, the judgment may be restored on appeal to this court and the action may be continued for that purpose. *Curr v. Rischer.* 117
2. *It seems* in case the death occurs after appeal to this court from an order of the General Term reversing the judgment, and the legal representatives of the decedent are not substituted, this court must take action as prescribed by the Code of Civil Procedure (§ 1298), where either party dies pending an appeal. *Id.*
3. A respondent, in moving to dismiss an appeal on the ground that the time for appealing had expired before service of notice of appeal, stands upon a strict right and must show a strict and technical compliance with the statute on his part to entitle him to the relief sought. *Good v. Daland.* 153
4. Where an alleged copy of judgment served was a true copy except the attestation of the clerk, required by the Code of Civil Procedure (§§ 1236, 1237), which was omitted, *held*, that the paper served was not a complete copy, and the service did not initiate the running of the time limited for appealing. *Id.*
5. Where, on motion to dismiss an appeal in a case, in which an interlocutory judgment had been entered on a demurrer, and so to authorize an appeal, the certificate of the court below was required (Code Civ. Pro. § 190, subd. 4), the appellant asked for leave to apply to the court below for the requisite certificate, which application was denied, *held*, that this did not preclude the appellant

- from thereafter making such application without leave, and on procuring the certificate from again appealing. *Id.*
6. The granting or withholding of an order of discovery, is a matter within the discretion of the Supreme Court, and its decision, based upon the merits of the application, is not reviewable here. *Finlay v. Chapman.* 404
7. When an error has been made in the form of a judgment, by which its scope has been enlarged or its amount increased beyond that plainly authorized by a verdict, referee's report or decision of the court, the judgment is not void or inoperative, and no question is presented for the consideration of the court on appeal; the error is an irregularity merely, which must be corrected, if at all, by motion in the court of original jurisdiction, to be made within one year after notice of the judgment or filing of the judgment-roll. (Code Civ. Pro. §§ 724, 1282.) *C. E. Bank v. Blye.* 414
8. In an action for divorce, brought by the wife, a motion for a temporary allowance and counsel fee was denied by the Special Term, on the ground that final judgment had been rendered for plaintiff, awarding her alimony and costs, and that, although the defendant had appealed therefrom and procured a stay, and the wife had no means of support or for defending the appeal, yet the court was without power to grant the relief desired. This order was reversed by the General Term, and the case remitted to the Special Term for a decision on the merits. *Held*, that the order of the General term was not final, and so was not appealable to this court. *McBride v. McBride.* 519
9. *It seems*, that power exists in such a case to make the allowance sought during the pendency of the appeal from the judgment and until the final determination of the action. (Code Civ. Pro. § 1769.) *Id.*
10. In an action for specific performance of a contract for the sale of land, it appeared that the contract was executed by defendants F. and R., in whom was the title. Their wives were also made defendants. They all joined in the answer, which recites, "defendants further admit that they did promise to convey the said premises to the plaintiff," and the only issue tendered therein or litigated was that the contract in suit was induced by the fraudulent representations of plaintiff. There was no allegation that the wives were not parties to the contract, or were not bound thereby. The issue of fraud was decided against defendants, and the judgment required their wives to join with their husbands in the conveyance directed. The defendants jointly excepted to the findings of facts and law, but none of the exceptions were directed toward said provision of the judgment. The General Term reversed that part of the judgment on the ground that the wives were not parties to the contract. *Held*, that as there was no special exception pointing out the objection, the reversal by the General Term was error. *Schoonmaker v. Bonnie.* 565
11. Where a reversal of a judgment by the General Term is upon the law, not the facts, to sustain the reversal here, it must appear that some exception was taken on the trial raising a question of law, and that such question was erroneously decided. *Id.*
12. A judgment will not be reversed as to one of several parties appellants, although to him erroneous in law, upon a general exception by all, in the absence of a special exception pointing out the error in the particular case. *Id.*
13. An exception to a finding of fact does not reach an erroneous reason given for it in an opinion of the court accompanying its decision; if there is in any view evidence to sustain it, this court is bound by it. *Rutherford v. Schattman.* 604
14. In the absence of an exception to a finding of fact by a referee, or of a request to find differently,

- the finding is not reviewable here.
West v. Van Tuyl. 620
15. The rulings of a trial judge will be presumed to be correct until the contrary is shown, and an objection thereto will not, as a general rule, be entitled to consideration in an appellate court when no ground of error is suggested; the court is not required to search for grounds on which to differ from the court below. *Id.*
16. The allowance of costs, upon a reference under the statute of a disputed claim against an estate, is within the discretion of the court below, and is not reviewable here. *Haurhurst v. Ritch.* 621
17. *It seems*, where an appellant intends to review, at General Term, findings of fact based upon conflicting evidence, in relation to which no exception lies, it must appear by the case that the whole evidence is contained therein. *Brayton v. Sherman.* 623
18. Where, however, an exception is filed to a finding of fact, as its only purpose is to bring up the question of law that there is no evidence tending to sustain the finding, it is for the respondent to see that all the evidence which tends in any way to support it, is contained in the case, and the question of law may be reviewed here without the statement in the case that it contains all the evidence. *Id.*
19. Where, upon inspection of the record filed in this court, in an action tried by a jury, it appears that the case presents no question of law that can be reviewed, the appeal will be dismissed on motion. *Dalzell v. L. I. R. R. Co.* 626
20. On an appeal in an action for the foreclosure of a mortgage, an undertaking against waste and for the value of the use and occupation of the mortgaged premises operates as a stay of proceedings, without a covenant to pay a deficiency, and it is optional with the appellant which form of undertaking he will give. (Code Civ. Pro. § 1331.) *Werner v. Tuch.* 632
21. Where a trial court makes a correct ruling upon an erroneous theory, or assumption, no error is committed authorizing a reversal. *Teall v. C. E. L. Co.* 654
22. In an action against a corporation upon an alleged contract, the making of the contract was expressly admitted by the answer and an affirmative defense set up. On the trial the admission in the pleading was not alluded to, but plaintiff gave proof of the execution of the contract by one of defendant's officers. The court directed a verdict for plaintiff. *Held*, that although the court might have been in error in holding the contract proved, plaintiff had the right to avail himself of the admission, to sustain the ruling on appeal, even if it was not taken into consideration by the court below. *Id.*
23. *It seems* that if the case had been submitted to the jury upon the evidence, and they had rendered a verdict for defendant, plaintiff, having acted upon the theory that the contract was in issue, could not, upon appeal or motion to set aside the verdict, have relied upon the admission. *Id.*
24. Although a copy of the record has been filed with the clerk of this court, on appeal to it, the court below so far retains jurisdiction of the case as to enable it to make such amendment as it shall deem proper, and to order the amendment to be duly certified to, and filed with the said clerk, and when duly filed, it is to be regarded as part of the original return. *Peterson v. Swan.* 662
25. A motion, therefore, to remit for the purpose of permitting the court below to amend the record, if it should desire to do so, is unnecessary and should be denied. *Id.*
26. *It seems* that when a record shows that the order or judgment of the court below appealed from, was by consent or was not an actual determination of that court, an appeal to this court may not be heard. *Id.*

— *When question not raised on trial may not be presented on appeal.*
See Varnum v. Hart. 101

— *Where the evidence, in proceedings against an officer of the police force of New York city, charged with "conduct unbecoming an officer," fails to show any breach of discipline or conduct unbecoming an officer, the case presents a question of law reviewable by the General Term on certiorari, and also reviewable here.*

See People ex rel. v. French. 493

— *When objection on trial insufficient to raise question as to competency of evidence.*

See Hauxhurst v. Ritch (Mem.). 621

ARBITRATION.

1. In an action to foreclose a mechanic's lien the defendant pleaded an arbitration and award. The particular claims actually submitted were not included in the record; it simply appeared they were claims growing out of a contract by which the plaintiff was to perform certain work and furnish certain materials in the erection of houses for defendants. The agreement of submission stated it embraced "all questions and disputes arising and to arise under said contract, including all claims of either party for damages for non-performance, delay or otherwise." The award recited that the arbitrators had "heard the proofs and allegations of the parties," and found that plaintiff, under the contract and in addition thereto, had performed work to an amount specified, and after crediting payments and deducting a sum for damages sustained from failure to complete the work within the time specified, allowed and awarded the plaintiff \$919.10. *Held*, that the award was conclusive as to all causes of action subsisting between the parties, springing out of their contractual relation; that it was incumbent upon plaintiff to show, if it desired to avoid its conclusiveness, that there were matters in difference presented which the arbitrators declined or neglected to

decide; also, *held*, that the court properly refused to allow a recovery for the amount awarded. *N. Y. L. & W. W. Co. v. Schneider.* 475

2. The submission, to arbitration by parties, of all matters in dispute, growing out of a particular transaction or contract, will estop them from thereafter claiming that the award is not conclusive and does not embrace a decision upon some particular matters. *Id.*
3. A submission of disputes to arbitrators, governed by common-law principles and rules, may be competently made, notwithstanding the provisions of the Code of Civil Procedure on that subject; and the provision therein (§ 2383) making a submission irrevocable by either party, after their allegations and proofs have closed and the matter has been finally submitted, applies to such a submission. *Id.*

ASSESSMENT AND TAXATION.

1. A decision denying an application of one party aggrieved, to vacate an assessment for a local improvement in the city of New York, does not validate the whole assessment, or bind or affect other parties aggrieved by it. *In re Rosenbaum.* 24
2. In proceedings to vacate an assessment imposed on the petitioner's property in 1872, on the ground that a portion of the work was done under a contract entered into without advertisement or opportunity for competition, it appeared that in similar proceedings by another petitioner to vacate an assessment on his property for the same improvement, the assessment was sustained. In the former proceedings there was no proof that the price for the work was excessive or unfair, while in this it appeared that on the same day the contract in question was made, contracts for similar work, as to which competition was permitted, were made at a much less price. At the date of the former decision, there was no provision for reduc-

- ing the assessment without vacating it wholly. *Held*, that the doctrine of *stare decisis* did not make the former decision conclusive in this case. *Id.*
3. Also, *held*, that the act of 1874 (chap. 313, Laws of 1874) did not bar a reduction of the assessment for the illegality complained of, and that an order making such a reduction was proper *Id.*
4. In an action to have certain taxes imposed upon real estate in the city of New York in and for the year 1882, adjudged void and cancelled, and to restrain their collection, the following facts appeared: The premises were purchased by one D., and were conveyed to him individually prior to the assessment and imposition of the tax; he purchased, however, for and with the moneys of plaintiff, a Roman Catholic church, of which he was pastor. It was common for priests of the church to have church property conveyed to them in this way. Prior to said conveyance, and ever since, said premises were and have been used exclusively for school purposes, under the management of D., as pastor — all branches of common school education being taught. Plaintiff was not incorporated as a religious body until in 1885, when D. conveyed the premises to it. The school has never been incorporated. A judgment was rendered in favor of plaintiff. *Held*, error; that said premises were not "a school-house" within the meaning, and were not exempt under the provisions, of the Revised Statutes (1 R. S., 388, § 4); that plaintiff being, when the tax was imposed, unincorporated, was not a "religious society" within the meaning of the acts (Chap. 282, Laws of 1852, and § 827, chap. 410, Laws of 1882) with reference to exemptions from taxations in the city of New York, which declare that the exemption of a school-house or other seminary of learning shall not apply unless the building is "exclusively the property of a religious society;" that the words refer to a society that has been incorporated. *Church of St. Monica v. Mayor, etc.* 91
5. The provision of the act of 1883 (Chap. 392, Laws of 1883), declaring that "All debts and obligations for the payment of money due or owing to persons residing within this state * * * wherever said securities shall be held shall be deemed, for the purpose of taxation, personal property within this state, and shall be assessed as such to the owner or owners," refers to debts or obligations which are solely due or owing to residents of this state; it does not include as owners persons who are trustees only, and while under the old law if a trustee residing here has possession of such securities he may be assessed for them as a trustee in possession, even if there be other trustees non-residents, the resident trustee may not be assessed for securities not held by him and not within this state, but which are in the possession of one of the non-resident trustees. *People ex rel. v. Coleman.* 137
6. Accordingly, *held*, where two of three co-trustees resided in this state, and the other resided in another state, the beneficiaries also being non-residents, that an assessment of securities in the hands of the non-resident trustee was void. *Id.*
7. Where a county treasurer, instead of applying taxes assessed on the property of a railroad corporation in a town to the payment or redemption of bonds of the town, issued in aid of the construction of the road of such corporation, as required by the act of 1869 (Chap. 907, Laws of 1869), as amended in 1871 (Chap. 283, Laws of 1871), applied them in payment of county and state taxes, with and as part of, other moneys raised by the town for those purposes, *held*, that an action, as for money had and received, was maintainable on behalf of the town against the county to recover the money so misappropriated; that the liability included as well the portion of the funds applied in payment of the state tax as that applied for other county purposes; also, that the action was properly brought by the supervisor of the town in his name

- as its representative. *Strough v. Supra. Jeff. Co.* 212
8. A county treasurer in the payment of state taxes to the state comptroller acts as agent for the county, and pays on its behalf. *Id.*
 9. Under the provisions of the charter of the city of Brooklyn (Tit. 18, §§ 4, 5, Chap. 863 Laws of 1873), making it the duty of the common council before ordering the grading or paving of a street "to lay out a district of assessment," and to cause a map to be made, designating the lots and parcels of land to be assessed for the improvement, and providing that the assessment shall be confined to said district, when a lot outside of the district is included in the assessment by mistake, the error is to be regarded as a clerical one, and so is included in the provision of the charter (Tit. 10, § 10) making it the duty of the board of assessors to rectify errors committed in assessments in certain cases, and among others "when the error is entirely clerical." *People ex rel. v. Wilson.* 515
 10. Mandamus is a proper remedy to compel the performance of this duty. When an order has been made granting the writ, the fact that it does not affirmatively appear that the relator, before the commencement of the proceedings, applied to the board to correct the mistake, is not a jurisdictional defect, requiring the reversal of the order. *Id.*
 11. Upon an application for a mandamus to compel the correction of such an assessment, it appeared that the board of assessors included by mistake, in an assessment for repaving, a lot of the relator outside of the district of assessment, and that the collector was proceeding to collect the same by levying on the relator's property. *Held*, the collector was properly joined as a party in the proceeding. *Id.*
 12. It was claimed that no remedy was open to the relator for the reason that the assessment had been confirmed by the common council, and that an assessment so confirmed is declared by the charter (Tit. 18, § 36) to be "final and conclusive." *Held*, untenable; that this provision did not apply to a case where the assessment is without jurisdiction and so void. *Id.*
 13. Where, in proceedings under the act of 1880 (Chap. 269, Laws of 1880) to reduce an assessment on real estate for the year 1887, it appeared that in 1885 and 1886, the assessors had assessed the land at the same sum, that in similar proceedings in each of those years, there had been a judicial determination fixing the actual value, and that the prior assessment had been reduced to the sum so fixed. *held*, that in the absence of evidence of an increase of value or of some change affecting the assessable value, the doctrine of *res adjudicata* applied, and the former adjudications were binding and conclusive. *People ex rel. v. Carter.* 557
 14. After the writ of certiorari was issued, the assessment-roll having been placed in the hands of the proper officer for collection, the relators paid the taxes imposed upon the property, leaving, however, with the officer a writing, stating that the taxes were paid under protest, for the reason that the assessment was excessive, and that for the correction thereof proceedings were then pending. *Held*, that in the absence of any evidence as to the circumstances under which the payment was made, the presumption was, that the payment was involuntary, and so, did not estop the relators. *Id.*
 15. *It seems*, where one pays, under protest, taxes based upon an assessment, not void, but simply excessive, and gives notice of his intention to review and correct the same in proceedings then pending for that purpose, and that he intends to reserve, not to waive or abandon, his proceedings, such a payment may not be set up as a bar to the further prosecution of the proceedings. *Id.*
 16. In proceedings under the act of 1880 (Chap. 269, Laws of 1880), to

review an assessment, where it appears to the court that the assessors have acted "with gross negligence," costs may be awarded against them. *People ex rel. v. Carter.* 654

ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. In an action to foreclose a mortgage held by plaintiffs, as assignees for the benefit of creditors of the mortgagees, defendant M., who had purchased the premises subject to the mortgage, sought to set off a claim against plaintiff's assignors. It appeared that at the time of the assignment to plaintiffs, the debt secured by the mortgage was not due; that the assignors were insolvent and M. endeavored to have his debt, which was due, applied by them upon the mortgage before it was assigned. *Held*, that he was equitably entitled to the set-off; that it was not necessary that the mortgage debt should have been due, as by seeking to have the debt due him applied thereon, M. had treated it as due and so waived any defense he might have based upon the fact that it was not due; that he had a right so to do and to require the set-off. *Richards v. La Tourette.* 54

2. The distinction between this case and one where the debt owing by the insolvent to the party desiring to avail himself of the set-off is not due, pointed out. *Id.*

3. A certificate of deposit issued by the assignors, who were bankers, was part of the amount M. sought to have offset against the mortgage; this had never been presented and a demand made for its payment at the banking-house of the assignors. *Held*, that a technical demand was not necessary in a case like this, where the set-off is claimed not as matter of law, but of equity; that the claim of set-off may be regarded as a demand, and should have relation to the time the assignment to plaintiffs was made, so far as to give form and life to the claim that the

debt of the insolvents was then due. *Id.*

4. It also appeared that M., after the assignment, recovered a judgment against the assignors for the amount of his debt, whereon an execution was returned unsatisfied. *Held*, that M. did not thereby lose his right of set-off. *Id.*

ATTACHMENT.

1. Where the affidavit, upon which an attachment was issued, stated that a cause of action existed in favor of plaintiff against defendant for an amount stated and then set forth the grounds of the claim, to wit, an indebtedness for goods sold to the amount specified, and also stated that no part had been paid, but the whole was due and owing, *held*, that this was a sufficient compliance with the provision of the Code of Civil Procedure (§ 636) requiring a plaintiff, on application for an attachment, to show by affidavit that he "is entitled to recover a sum stated therein." *Buell v. Van Camp.* 160

2. An attachment was applied for and granted, on the ground that the defendant had departed from the state with intent to defraud his creditors, which was alleged by plaintiff in his affidavit, on information and belief; he stated that the sources of his information and the grounds of his belief were the affidavits of two persons named, which he averred had that day been presented to the judge to whom the application was made and by him ordered filed. Copies of said affidavits were attached; these contained statements of facts sufficient to show the departure with the intent alleged. *Held*, that the affidavit was sufficient to give jurisdiction to issue the attachment. *Id.*

ATTICA (TOWN OF).

1. An act passed in 1887 (Chap. 205, Laws of 1887), which by its title is declared to be "An act to legalize the acts and proceedings" of the town board of auditors, com-

missioner of highways and of a town meeting in the town of Attica in relation to the erection of a certain bridge, which had been erected under a contract with the highway commissioner, after legalizing said acts and proceedings, contains a provision that it shall not be considered as requiring the town to pay the contract-price, but empowers the contractor to bring suit against the town to recover a fair and reasonable compensation for the work and material. *Held*, the provision is within the scope of the subject expressed in the title, and so is not violative of the provisions of the State Constitution (art. 3, § 16), prohibiting the passage of any private or local act embracing more than one subject and requiring that to be expressed in the title. *W. I. B. Co. v. Town of Attica.* 204

2. Also, *held*, that said act is not repugnant to the provisions of said Constitution (art. 3, § 18), prohibiting the passage of a private or local bill providing for building bridges, or the provision (art. 3, § 18) requiring that in an act authorizing taxation the purpose of the tax shall be stated. *Id.*

AWARD.

1. In an action to foreclose a mechanic's lien the defendant pleaded an arbitration and award. The particular claims actually submitted were not included in the record; it simply appeared they were claims growing out of a contract by which the plaintiff was to perform certain work and furnish certain materials in the erection of houses for defendants. The agreement of submission stated it embraced "all questions and disputes arising and to arise under said contract, including all claims of either party for damages for non-performance, delay or otherwise." The award recited that the arbitrators had "heard the proofs and allegations of the parties," and found that plaintiff, under the contract and in addition thereto, had performed work to an amount specified, and after crediting pay-

ments and deducting a sum for damages sustained from failure to complete the work within the time specified, allowed and awarded the plaintiff \$919.10. *Held*, that the award was conclusive as to all causes of action subsisting between the parties, springing out of their contractual relation; that it was incumbent upon the plaintiff to show, if it desired to avoid its conclusiveness, that there were matters in difference presented which the arbitrators declined or neglected to decide; also, *held*, that the court properly refused to allow a recovery for the amount awarded. *N. Y. L. & W. W. Co. v. Schneider et al.* 475

2. The submission to arbitration, by parties, of all matters in dispute, growing out of a particular transaction or contract, will estop them from thereafter claiming that the award is not conclusive and does not embrace a decision upon some particular matters. *Id.*
3. An award is a complete bar to the maintenance of any action upon the original right or cause; for it the award is substituted, which is a new right, with corresponding obligations. *Id.*
4. It appeared that when the arbitrators had made their award the parties were notified, but delivery was withheld until payment of the fees and expenses. No time for the delivery of the award was fixed by the submission. The case showed that the arbitrators were requested to make frequent inspections of the work in progress and to give directions about it. *Held*, that the authority to award against one or both of the parties the costs of the arbitration was incident to the general submission, and the arbitrators had a right to hold the award as security for the payment of their charges in the absence of a condition in the agreement of submission to the contrary. *Id.*
5. In legal contemplation an award takes effect when ready for delivery and the parties have been notified to that effect. *Id.*

BAILMENT.

1. A bailee, whatever the character of the bailment may be, is, when its purpose is fully satisfied, bound, upon request, to re-deliver the thing bailed to its lawful owner. *Ouderkirk v. C. N. Bank.* 263
2. To justify a refusal to return the property, on the ground of a loss thereof, the burden is upon the bailee of showing the exercise by him of due care according to the nature of the bailment. *Id.*
3. *It seems*, such re-delivery may be excused in the case of a bailment mutually beneficial to the parties, by proof that the deposit has been lost or destroyed without negligence or want of such care on the part of a bailee as prudent men under similar circumstances commonly take of their own goods. *Id.*
4. *It seems*, also, that in the case of gratuitous bailments the bailee is only chargeable with gross neglect. *Id.*
5. In an action to recover for the conversion of certain bonds, it appeared that plaintiff, a regular customer of defendant, deposited the bonds with it as collateral security for discounts. Discounts and renewals upon the security of such bonds were obtained by plaintiff, from time to time, during a period of four years. When the last note so discounted was paid, defendant's cashier, at his own suggestion, delivered to plaintiff a receipt signed by him as cashier, acknowledging the receipt of the bonds as collateral and stating that all loans having been paid, the bonds were retained for future like use or safe keeping, subject to plaintiff's order. Defendant thereafter, as it had done before, paid the coupons falling due on the bonds to plaintiff until October, 1887. In February, 1888, plaintiff demanded a return of the bonds but was informed that they could not be found; no information was afforded him in respect to the circumstances attending their disappearance or the mode by which they had been removed, if at all, from the possession of the bank. Upon the trial defendant

gave evidence tending to show that it was its custom to return securities, held as collateral, to the owner upon payment of loans; that while held they were kept with other valuable securities belonging to defendant in a steel box inclosed in an iron safe; that the safe and box had combination locks, the combination on the box being known to defendant's president and cashier alone and the latter alone having the key. It was also proved that the cashier had been in defendant's employ for many years and had borne a good reputation until December, 1887, when he was removed for the alleged reason that he was a defaulter. All of defendant's officers, except said cashier, testified that they had no knowledge of its possession of the bonds or of the place where they were kept after the loans were paid, and that they, respectively, had not abstracted them. Defendant's by-laws provided for the appointment by its president, once at least in every three months, of a committee, consisting of two members of the board, who with the president and cashier should constitute a committee of examination, and they were required to examine all matters "pertaining to the affairs of the institution" and report the same. Examinations were only made once in six months by three examiners and were confined to the securities owned by defendant and those it held as collateral for unpaid loans. The reports showed no account of such collaterals or of special deposits. Defendant was accustomed to receive special deposits from its customers for safe keeping, which were usually kept in the vault, but were not entered upon its books, and no subsequent examination, inspection or report in relation thereto was ever made or provided for. No other evidence was given as to the disappearance of the bonds. Defendant's cashier was not called as a witness. *Held*, that defendant was not a gratuitous bailee, but the bailment was one for mutual benefit, and it was liable, at least, for failure to exercise ordinary and reasonable care and diligence in the custody of the bonds; that it

was within the authority of the cashier to make the agreement on its part to continue as custodian of the bonds, for the purposes for which they had theretofore been used, and the fact that all the loans were paid did not change the character of its liability; that the evidence failed to show the exercise on its part of the requisite degree of care and justified a submission of the case to the jury and a verdict for plaintiff. *Id.*

6. In an action to recover damages for the alleged conversion of a quantity of lumber, which had been transferred to plaintiff by the firm of G. & E. H., it appeared that said firm, having contracted to build two boats for defendant, ordered lumber of it; the order specified kinds and quantities, but no prices; the lumber was forthwith delivered, accompanied by a bill, in which the firm was described as debtors to defendant for the lumber, and the quantity, kind and price were set forth. Defendant was not required by the contract to furnish any lumber, nor were the contractors required to purchase any from it. It did not appear there were any negotiations between the parties prior to the delivery of the lumber as to the terms and conditions on which the lumber was to be furnished. Defendant proved that it kept on hand lumber for building boats, including pieces specially shaped, which it used for that purpose, and also furnished to builders having contracts with it, but only to be used in boats built for it, and that the value of the lumber so furnished was deducted from the price of the boat in which it was used, which custom was known to G. & E. H. At the close of the evidence a motion by defendant's counsel for a nonsuit was granted. *Held*, error; that the question whether there was a bailment or a sale was for the jury. *Crosby v. Prest., etc., D. & H. C. Co.* 334

BANKRUPTCY.

The fact that an insolvent debtor, after the commencement of bankruptcy proceedings against him,

transferred property, by way of preference, to a creditor, in violation of the provisions of the Bankrupt Act, is not, under the laws of this state, any evidence of fraud. *Talcott v. Harder.* 536

BANKS AND BANKING.

1. Where one bank has funds on deposit with another, the law implies a contract between them that the latter shall pay the amount standing to the credit of the former, upon and according to its drafts or order, and a failure so to pay, is a breach of contract, for which the debtor bank is legally liable; the remedy of the depositor is not confined to a suit for the whole deposit. *C. N. Bank. v. I. & T. N. Bank.* 195
2. A forged indorsement does not pass title to commercial paper, negotiable only by indorsement, and payment by the drawee of a draft so indorsed although in good faith, is, as to the true owner, no payment. *Id.*
3. Plaintiff's complaint alleged, in substance, the making and delivery by it to W. & Co. of certain drafts, which were set forth, drawn upon defendant, with whom it had sufficient funds on deposit to pay the drafts, and made payable to the order of W. & Co., the indorsement of the drafts by the payees, a presentation and demand for payment, defendant's refusal to pay and protest for non-payment, and that, by reason of the non-payment, plaintiff was compelled to pay the amount of the drafts and take them up. The answer set up simply payment. *Held*, that while the complaint was technically open to criticism, yet it contained a plain statement of the facts from which, as a legal conclusion, plaintiff had a right to recover for a breach of defendant's implied contract to pay out plaintiff's funds, and as defendant could in nowise have been misled, a recovery for that cause of action was proper. *Id.*
4. *It seems* the averment that plaintiff repaid the money received for

the drafts and took them up, was immaterial to establish a cause of action; the repayment simply established the amount of damages. *Id.*

5. It appeared that W. & Co. purchased from plaintiff the drafts, which, after indorsing, they delivered to their bookkeeper to be forwarded to certain of their creditors. The bookkeeper erased the indorsements, forged others and used the drafts for his own purposes; they were finally presented by another bank to and paid by defendant. After the forgeries were discovered, and upon the return of the drafts to plaintiff, W. & Co. demanded and obtained them, and on presentation, defendant refused payment, on the ground that they had been paid. Plaintiff repaid to W. & Co. the amount paid for them. *Held*, that plaintiff was entitled to recover the amount of the drafts. *Id.*

6. Defendant offered to prove that before plaintiff paid back to W. & Co. the amount of the dishonored drafts, that firm had settled with their bookkeeper, and for his indebtedness to them, including the appropriation of the drafts, had received certain property. This was objected to and excluded. *Held*, no error; that this evidence was not admissible under the pleadings; also, if an answer had been allowed, it would not have shown that W. & Co. had been paid. *Id.*

7. In an action to recover for the conversion of certain bonds, it appeared that plaintiff, a regular customer of defendant, deposited the bonds with it as collateral security for discounts. Discounts and renewals upon the security of such bonds were obtained by plaintiff, from time to time, during a period of four years. When the last note so discounted was paid, defendant's cashier, at his own suggestion, delivered to plaintiff a receipt signed by him as cashier, acknowledging the receipt of the bonds as collateral, and stating that all loans having been paid, the bonds were retained for future like use or safe keeping, subject to plaintiff's order. De-

fendant thereafter, as it had done before, paid the coupons falling due on the bonds to plaintiff until October, 1887. In February, 1888, plaintiff demanded a return of the bonds, but was informed that they could not be found; no information was afforded him in respect to the circumstances attending their disappearance or the mode by which they had been removed, if at all, from the possession of the bank. Upon the trial defendant gave evidence tending to show that it was its custom to return securities, held as collateral, to the owner upon payment of loans; that while held they were kept with other valuable securities belonging to defendant in a steel box inclosed in an iron safe; that the safe and box had combination locks, the combination on the box being known to defendant's president and cashier alone, and the latter alone having the key. It was also proved that the cashier had been in defendant's employ for many years, and had borne a good reputation until December, 1887, when he was removed for the alleged reason that he was a defaulter. All of defendant's officers, except said cashier, testified that they had no knowledge of its possession of the bonds or of the place where they were kept after the loans were paid, and that they, respectively, had not abstracted them. Defendant's by-laws provided for the appointment by its president once at least in every three months of a committee, consisting of two members of the board, who, with the president and cashier, should constitute a committee of examination, and they were required to examine all matters "pertaining to the affairs of the institution," and report the same. Examinations were only made once in six months by three examiners, and were confined to the securities owned by defendant and those it held as collateral for unpaid loans. The reports showed no account of such collaterals or of special deposits. Defendant was accustomed to receive special deposits from its customers for safe keeping, which were usually kept in the vault, but were not entered upon its

books, and no subsequent examination, inspection or report in relation thereto was ever made or provided for. No other evidence was given as to the disappearance of the bonds. Defendant's cashier was not called as a witness. *Held*, that defendant was not a gratuitous bailee, but the bailment was one for mutual benefit, and it was liable, at least, for failure to exercise ordinary and reasonable care and diligence in the custody of the bonds; that it was within the authority of the cashier to make the agreement on its part to continue as custodian of the bonds, for the purposes for which they had theretofore been used, and the fact that all the loans were paid did not change the character of its liability; that the evidence failed to show the exercise on its part of the requisite degree of care and justified a submission of the case to the jury and a verdict for plaintiff. *Ouderkirk v. C. N. Bank.*

263

BILLS, NOTES AND CHECKS.

1. *It seems* that on a purchase of promissory notes, appearing on their face to be valid and uncanceled obligations, but which in fact have been paid, or the indorsers upon which have been discharged to the knowledge of the vendor, the vendee, in case he purchased without notice, has a cause of action against the vendor, based upon an implied warranty that the notes were what they appeared to be. *Manderille v. Newton.*

10

2. Where, however, a party holding certain notes, with other indebtedness against the maker, and holding certain claims as collateral security therefor, and who had made various collections on the collaterals, sufficient to pay the notes, but which had not been applied in payment of any specific items of indebtedness, at the instance of the debtor, and on payment of the balance due him, assigned his claims and transferred the notes with the collaterals to another creditor, without any express warranty that the notes were

valid outstanding obligations, *held*, that no warranty could be implied. *Id.*

3. A forged indorsement does not pass title to commercial paper, negotiable only by indorsement, and payment by the drawee of a draft so indorsed, although in good faith, is, as to the true owner, no payment. *C. N. Bank v. I. & T. N. Bank.*

195

4. Plaintiff's complaint alleged, in substance, the making and delivery by it to W. & Co. of certain drafts, which were set forth, drawn upon the defendant, with whom it had sufficient funds on deposit to pay the drafts, and made payable to the order of W. & Co., the indorsement of the drafts by the payees, a presentation and demand for payment, defendant's refusal to pay and protest for non-payment, and that, by reason of the non-payment, plaintiff was compelled to pay the amount of the drafts and take them up. The answer set up simply payment. *Held*, that while the complaint was technically open to criticism, yet it contained a plain statement of the facts from which, as a legal conclusion, plaintiff had a right to recover for a breach of defendant's implied contract to pay out plaintiff's funds, and as defendant could in nowise have been misled, a recovery for that cause of action was proper. *Id.*

5. *It seems*, the averment that plaintiff repaid the money received for the drafts and took them up, was immaterial to establish a cause of action; the repayment simply established the amount of damages. *Id.*

6. It appeared that W. & Co. purchased from plaintiff the drafts, which, after indorsing, they delivered to their bookkeeper to be forwarded to certain of their creditors. The bookkeeper erased the indorsements, forged others and used the drafts for his own purposes; they were finally presented by another bank to and paid by defendant. After the forgeries were discovered, and upon the return of the drafts to the plaintiff,

W. & Co. demanded and obtained them, and on presentation defendant refused payment on the ground that they had been paid. Plaintiff repaid to W. & Co. the amount paid for them. *Held*, that plaintiff was entitled to recover the amount of the drafts. *Id.*

7. Defendant offered to prove that before plaintiff paid back to W. & Co. the amount of the dishonored drafts, that firm had settled with their bookkeeper, and for his indebtedness to them, including the appropriation of the drafts, had received certain property. This was objected to and excluded. *Held*, no error; that this evidence was not admissible under the pleadings; also, if an answer had been allowed, it would not have shown that W. & Co. had been paid. *Id.*

8. An action having been commenced by certain taxpayers of the town of S. in their own behalf and that of other taxpayers, to restrain the enforcement of certain town bonds, and to have the law under which they were issued adjudged unconstitutional, a resolution was adopted at an annual town meeting authorizing the supervisor of the town, on consent of the plaintiffs in said action, to assume control thereof, prosecute it to a final determination and pay all the expenses; and for that purpose to borrow on the credit of the town all sums of money needed. The supervisor, acting in accordance with the resolution, borrowed money on the credit of the town, giving its notes therefor, which money was used for the purpose specified. In an action upon the notes, *held*, that, assuming the electors of the town had power to authorize its supervisor to take control of the pending action, also, that it might be treated as if commenced in the name of the town or its supervisor, and that said electors had power to direct money to be raised for prosecuting that action, this action was not maintainable. *Wells v. Town of Salina.* 280

9. Where the maker of negotiable paper shows that it has been obtained from him by fraud, a subsequent transferee, must, before

he is entitled to recover thereon, show that he is a *bona fide* purchaser, or that he derived his title from such a purchaser. It is not sufficient to show simply that he purchased before maturity and paid value, he must show that he had no knowledge or notice of the fraud. *Vosburgh v. Diefendorf.* 357

10. The provision of the Code of Civil Procedure (§ 1778), declaring that, in an action against a corporation "to recover damages for the non-payment of a promissory note, or other evidence of debt for the absolute payment of money upon demand, or at a particular time, * * * unless the defendant serves with a copy of his answer or demurrer, a copy of an order of a judge directing that the issues presented by the pleadings be tried, the plaintiff may take judgment, as in case of default in pleading at the expiration of twenty days," does not apply to an action wherein it is sought to charge a corporation as indorser of a promissory note; it is to be confined strictly to actions upon instruments which admit on their face an existing debt payable absolutely. *Shorer v. T. P. & P. Co.* 488

BONA FIDE HOLDER.

1. Where the maker of negotiable paper shows that it has been obtained from him by fraud, a subsequent transferee, must, before he is entitled to recover thereon, show that he is a *bona fide* purchaser, or that he derived his title from such a purchaser. It is not sufficient to show simply that he purchased before maturity and paid value, he must show that he had no knowledge or notice of the fraud. *Vosburgh v. Diefendorf.* 357

2. In an action upon a promissory note against defendant as maker, it appeared that his signature thereto was procured by fraud. The note was purchased of the payee by R. before maturity, for half its face value. Plaintiff claimed as purchaser from R.

Defendant's evidence tended to show that R. purchased with moneys furnished by plaintiff, who was present at the time of the transfer and directed R. to purchase. R. testified that he had no knowledge of the fraudulent origin of the paper, or of any facts constituting a defense. Neither the plaintiff nor the payee were sworn as witnesses. The trial court held that plaintiff, as matter of law, was entitled to recover the amount he paid for the note, but if anything beyond that was claimed, the case was one for the jury. Plaintiff having elected to take a verdict for the amount he paid for the note, a verdict was directed accordingly. *Held*, error; that the question as to whether plaintiff was a *bona fide* purchaser, was one of fact for the jury; as was also the question as to whether R. purchased for himself or as agent; that if in the latter capacity, although he was not chargeable with notice of the fraud, this would not shield plaintiff from the legal consequences of any notice he himself might have had. *Id.*

BOND.

See UNDERTAKING.

BROKERS.

One S., a rubber broker, by means of false and fraudulent representations that he had effected a sale of a quantity of rubber for plaintiff, obtained from him a delivery order for the rubber, then on board of a steamboat, for the purpose of delivery to the alleged purchaser. By means of such order S. obtained possession of the rubber, stored it and took a warehouse receipt therefor in his own name, which he delivered to defendant to secure an advance, to be paid on sale of the rubber. Defendant sold, and after deducting the advance, paid over the balance to S. In an action to recover possession of the rubber, *held*, that S. obtained possession by a larceny; and so, that defendant acquired no title and was liable for a conversion. *Soltau v. Gerdau.* 380

BROOKHAVEN (TOWN OF).

1. In an action to recover damages for the erection, and to compel the removal, of a wharf and bridge alleged to have been unlawfully erected by defendants upon lands of plaintiffs, adjoining and under the waters of Setauket bay, in the town of Brookhaven, Long Island, plaintiffs claimed title to the land above high-water mark as descendants of F., one of the original proprietors of the town, to whom a lot including the upland adjoining the bay was allotted. It appeared that the structures in question extended above high-water mark in front of the F. lot. *Held*, that in the absence of any evidence of a reservation by the town of land above high-water mark, the presumption was that plaintiffs' title extended to that mark; and so far as said structures extended above it, they were entitled to have them removed. *Roe v. Strong.* 316

2. As to the lands under water plaintiffs claimed title under a deed from S. to B., executed in 1768, which purported to convey "a certain piece of salt thatch," the bounds of which as given included the *locus in quo*. It appeared that plaintiffs and their predecessors in title, so far back as the memory of living witnesses extended, exercised acts of ownership by cutting thatch, leasing the right to cut to others, and in one instance brought suit against an alleged trespasser. It also appeared that, prior to 1693, the town had conveyed to a private person the land under water in the bay up to the line of and excepting that portion included in the deed to B. *Held*, that the evidence justified the presumption of a grant of the soil, and so made out a *prima facie* title in the plaintiffs; and that, therefore, a dismissal of the complaint was error. *Id.*

BROOKLYN (CITY OF).

1. The provision of the charter of the city of Brooklyn (§ 80, tit. 22, chap. 583, Laws of 1888) prohibiting the maintenance of an action against

the city, unless it shall appear by the complaint that thirty days have elapsed since the presentation of the claim or claims upon which the action is founded duly verified to the comptroller of the city for adjustment, does not apply to claims arising *ex delicto*. *Harrigan v. City of Brooklyn*. 156

2. In an action to recover damages for the death of D., plaintiff's intestate, alleged to have been caused by drinking unwholesome water from a well, used gratuitously by the public, belonging to defendant, and under its control, it was not claimed either that the well or pump was improperly constructed or out of repair, that the water became unwholesome from any defect in the well, or from any external exposure which could, by any reasonable care, have been avoided; that defendant, or any of its officers, or anyone, did anything to render the water impure; that anything could have been done to purify it or prevent its impurity, which could only be discovered by a careful chemical analysis; or that defendant, prior to the death of D., had notice of the unwholesome character of the water. The well had been extensively used for years, and there was no proof that prior to August, 1882, the water had caused any injury. D. died August 24, 1882. The plaintiff was nonsuited. *Held*, no error; that while it was the duty of defendant to use reasonable diligence to keep the well in repair and to guard against any dilapidation or danger resulting from its use, it was not an insurer of the quality of the water, and to authorize a recovery it was necessary for plaintiff to show willful misconduct or culpable neglect, and this the evidence failed to do. *Danaher v. City of Brooklyn*. 241

8. Under the provisions of the charter of the city of Brooklyn (Tit. 18, §§ 4, 5, Chap. 863 Laws of 1878), making it the duty of the common council before ordering the grading or paving of a street "to lay out a district of assessment," and to cause a map to be made designating the lots

and parcels of land to be assessed for the improvement, and providing that the assessment shall be confined to said district, when a lot outside of the district is included in the assessment by mistake, the error is to be regarded as a clerical one, and so is included in the provision of the charter (Tit. 10, § 10) making it the duty of the board of assessors to rectify errors committed in assessments in certain cases and among others "when the error is entirely clerical." *People ex rel. v. Wilson*. 515

4. Mandamus is a proper remedy to compel the performance of this duty. When an order has been made granting the writ, the fact that it does not affirmatively appear that the relator, before the commencement of the proceedings, applied to the board to correct the mistake, is not a jurisdictional defect, requiring the reversal of the order. *Id.*
5. Upon an application for a mandamus to compel the correction of such an assessment, it appeared that the board of assessors included by mistake, in an assessment for re-paving, a lot of the relator outside of the district of assessment, and that the collector was proceeding to collect the same by levying on the relator's property. *Held*, the collector was properly joined as a party in the proceeding. *Id.*
6. It was claimed that no remedy was open to the relator for the reason that the assessment had been confirmed by the common council, and that an assessment so confirmed is declared by the charter (Tit. 18, § 36) to be "final and conclusive." *Held*, untenable; that this provision did not apply to a case where the assessment is without jurisdiction and so void. *Id.*

BURDEN OF PROOF.

To justify a refusal on the part of a bailee to return the property, on the ground of a loss thereof, the burden is upon the bailee of showing the exercise by him of due care according to the nature of the

bailment. *Ouderkirk v. C. N. Bank.* 263

—*Burden is upon party claiming, under deed from wife to husband, to show consideration.*

See Dean v. M. E. R. Co. 540

BUSINESS CORPORATIONS.

Under the provisions of the act of 1875, providing for the organization of certain business corporations (§ 37, chap. 611, Laws of 1875), which makes the stockholders "in limited liability companies" individually liable "to an amount equal to the amount of stock held by them respectively" for all the debts of the company, until the whole amount of capital stock has been paid in and a certificate thereof made and recorded, the liability so imposed is not penal, but is in the nature of a contract obligation, and so it survives the death of a stockholder, and continues against his personal representatives. The statutory obligation which the stockholder assumes when he becomes such, is inherent in, and becomes part of every contract made by the corporation with the creditors prior to the time that the certificate required is filed. *Cochran v. Wiechers.* 399

CASE.

1. *It seems*, where an appellant intends to review, at General Term, findings of fact based upon conflicting evidence, in relation to which no exception lies, it must appear by the case that the whole evidence is contained therein. *Brayton v. Sherman.* 623
2. Where, however, an exception is filed to a finding of fact, as its only purpose is to bring up the question of law that there is no evidence tending to sustain the finding, it is for the respondent to see that all the evidence which tends in any way to support it, is contained in the case, and the question of law may be reviewed here without the statement in the case that it contains all the evidence. *Id.*

3. Where, upon inspection of the record filed in this court, in an action tried by a jury, it appears that the case presents no question of law that can be reviewed, the appeal will be dismissed on motion. *Dalzell v. L. I. R. R. Co.* 626

CASES REVERSED, DISTINGUISHED, ETC.

- Richards v. LaTourette* (53 Hun, 623), reversed. *Richards v. LaTourette.* 54
- Chance v. Isaacs* (5 Paige, 592), distinguished. *Richards v. LaTourette.* 58
- Bradley v. Angel* (3 N. Y. 475), distinguished. *Richards v. LaTourette.* 58
- Myers v. Davis* (22 N. Y. 492), distinguished. *Richards v. LaTourette.* 58
- Martin v. Kunzmuller* (37 N. Y. 397), distinguished. *Richards v. LaTourette.* 58
- Jordan v. N. S. & L. Bk.* (74 N. Y. 470), distinguished. *Richards v. LaTourette.* 58
- Munger v. A. C. N. Bk.* (85 N. Y. 580), distinguished. *Richards v. LaTourette.* 58
- Richards v. Village of Union* (48 Hun, 263), overruled. *Richards v. LaTourette.* 60
- In re Chauncey* (53 Hun, 134), reversed. *In re Chauncey.* 77
- Cassamaijor v. Pearson* (8 Cl. & Fin. 100), distinguished. *In re Chauncey.* 83
- Baker v. Baker* (6 H. L. Cases, 616), distinguished. *In re Chauncey.* 85
- Walling v. Miller* (108 N. Y. 173), distinguished. *Varnum v. Hart.* 108
- People v. Hagadorn* (104 N. Y. 516), distinguished. *Varnum v. Hart.* 109

- People ex rel. v. Supercisors* (67 N. Y. 330), distinguished. *People ex rel. v. Suprs. West. Co.* 130
- Van Alstyne v. Cook* (25 N. Y. 489), distinguished. *Good v. Daland.* 156
- Goelet v. Spofford* (55 N. Y. 647), distinguished. *Good v. Daland.* 156
- Clapp v. Hauley* (97 N. Y. 610), distinguished. *Good v. Daland.* 156
- Minick v. City of Troy* (83 N. Y. 514), distinguished. *Harrigan v. City of Brooklyn.* 159
- Reining v. City of Buffalo* (102 N. Y. 309), distinguished. *Harrigan v. City of Brooklyn.* 159
- Dickinson v. Mayor, etc.* (92 N. Y. 584), distinguished. *Harrigan v. City of Brooklyn.* 159
- Brehm v. Mayor, etc.* (104 N. Y. 186), distinguished. *Harrigan v. City of Brooklyn.* 159
- Jackson v. Williamson* (2 T. R. 281), distinguished. *Hodgkins v. Mead.* 174
- Rex v. Woodfall* (5 Burr, 2661), distinguished. *Hodgkins v. Mead.* 174
- Bridges v. Bd. of Supercisors* (92 N. Y. 574), distinguished. *Strough v. Suprs. Jeff. Co.* 217
- Larkin v. O'Neil* (48 Hun, 591), reversed. *Larkin v. O'Neill.* 221
- Milnes v. Mayor, etc.* (L. R. [10 Q. B. Div.] 124), distinguished. *Danaher v. City of Brooklyn.* 250
- Vosper v. Mayor, etc.* (17 J. & S. 296), distinguished. *Danaher v. City of Brooklyn.* 255
- Howard v. Legg* (11 N. E. 614), distinguished. *Danaher v. City of Brooklyn.* 255
- Jones v. New Haven* (34 Conn. 13), distinguished. *Danaher v. City of Brooklyn.* 255
- Norristown v. Moyer* (67 Penn. St. 355), distinguished. *Danaher v. City of Brooklyn.* 255
- People v. Albany* (11 Wend. 539), distinguished. *Danaher v. City of Brooklyn.* 255
- Nerins v. City of Peoria* (41 Ill. 502), distinguished. *Danaher v. City of Brooklyn.* 255
- Shawneetown v. Mason* (82 Ill. 337), distinguished. *Danaher v. City of Brooklyn.* 255
- Rex v. Medley* (6 C. & P. 292), distinguished. *Danaher v. City of Brooklyn.* 255
- Goldsmid v. T. W. I. Co.* (L. R. [Eq. Cas.] 161), distinguished. *Danaher v. City of Brooklyn.* 255
- Charles v. H. L. Board* (52 L. J. [N. S.] 554), distinguished. *Danaher v. City of Brooklyn.* 255
- Brown v. Illius* (27 Conn. 84), distinguished. *Danaher v. City of Brooklyn.* 255
- Ballard v. Tomlinson* (L. R. [29 Ch. Div.] 115), distinguished. *Danaher v. City of Brooklyn.* 255
- Miller v. Moses* (55 Me. 128), distinguished. *Martin v. Gilbert.* 311
- Carpenter v. Bueller* (8 M. & W. 208), distinguished. *Martin v. Gilbert.* 314
- Reed v. McCourt* (41 N. Y. 435), distinguished. *Martin v. Gilbert.* 314
- Roe v. Strong* (107 N. Y. 350), distinguished. *Roe v. Strong.* 320
- Mutual Life Ins. Co. v. Shipman* (50 Hun, 578), reversed. *M. L. Ins. Co. v. Shipman.* 324
- Marrin v. Smith* (46 N. Y. 571), distinguished. *M. L. Ins. Co. v. Shipman.* 333
- Dalrymple v. Hillenbrand* (62 N. Y. 5), distinguished. *Vosburgh v. Diefendorf.* 366
- Coring v. Altman* (71 N. Y. 435), distinguished. *Vosburgh v. Diefendorf.* 366

Baines v. Swainson (4 B. & S. 270), distinguished. *Soltau v. Gerdau*. 394

Vickers v. Hertz (L. R. [2 S. & D. App.] 113), distinguished. *Soltau v. Gerdau*. 395

Corn Exchange Bank v. Blye (54 Hun, 312), reversed. *C. E. Bank v. Blye*. 414

Donnegan v. Erhart (23 J. & S. 502), reversed. *Donnegan v. Erhardt*. 468

Langlois v. B. & R. R. Co. (19 Barb. 364), overruled. *Donnegan v. Erhardt*. 468

People ex rel. v. French (110 N. Y. 494), distinguished. *People ex rel. v. French*. 496

People ex rel. Hogan v. French (119 N. Y. 493), distinguished. *People ex rel. v. French*. 505

Winton v. Winton (31 Hun, 290), questioned. *McBride v. McBride*. 521

Kamp v. Kamp (59 N. Y. 212), distinguished. *McBride v. McBride*. 521

Erkenbrach v. Erkenbrach (96 N. Y. 456), distinguished. *McBride v. McBride*. 521

Yates County Nat. Bank v. Carpenter (49 Hun, 40), reversed. *Y. C. N. Bank v. Carpenter*. 550

Wygant v. Smith (2 Lans. 185), distinguished and limited. *Y. C. N. Bank v. Carpenter*. 556

People v. Stout (3 Park. C. R. 670), distinguished. *People v. Kemmler*. 585

Routledge et al. v. Worthington Co. (23 J. & S. 565), reversed. *Routledge v. Worthington Co.* 593

CAUSES OF ACTION.

1. It seems that on a purchase of promissory notes, appearing on their face to be valid and uncanceled obligations, but which in fact have been paid or the indorsers upon which have been dis-

charged to the knowledge of the vendor, the vendee, in case he purchased without notice, has a cause of action against the vendor, based upon an implied warranty that the notes were what they appeared to be. *Manderille v. Newton*. 10

2. Certain creditors of a corporation, whose claims against it were valid and past due, and against which there was no defense, knowing the corporation to be insolvent, and for the purpose of obtaining a preference over other creditors, commenced action against it, the summons being served upon D., one of its directors, under an arrangement with him that he would not disclose the service to the other officers; he carried out the agreement and suffered said creditors to obtain judgment by default. The corporation had no real estate and its personal property was levied upon and sold under execution issued on said judgments. In an action brought by a receiver of the corporation, appointed subsequent to the levy, to have the judgments declared void and set aside, *held*, that the arrangement did not constitute an assignment or transfer; that there was no violation of said statute; and that the action was not maintainable. *Varnum v. Hart*. 101

3. The provisions of the charter of the city of Brooklyn (§ 30, tit. 22, chap. 583, Laws of 1888) prohibiting the maintenance of an action against the city, unless it shall appear by the complaint that thirty days have elapsed since the presentation of the claim or claims upon which the action is founded duly verified to the comptroller of the city for adjustment, does not apply to claims arising *ex delicto*. *Harrigan v. City of Brooklyn*. 156

— A town not liable for money borrowed on its credit pursuant to resolution of town meeting in absence of statute authorizing it.

See *Wells v. Town of Salina*. 280

See CONVERSION.

FRAUD.

FRAUDULENT CONVEYANCES.

MONEY HAD AND RECEIVED.

TRESPASS.

CERTIORARI.

1. *It seems*, that under the provision of the Code of Civil Procedure (§ 2140) in regard to the questions to be determined upon the hearing on the return of a certiorari, where that writ is issued to review the determination of the police commissioners, the Supreme Court may inquire not only whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination, but it must look into the evidence, and if it finds that there is a preponderance of evidence against the determination of the commissioners, it has the same jurisdiction to reverse the determination it now has to set aside the verdict of a jury as against the weight of evidence. *People ex rel. v. French.* 502
2. Where, in proceedings under the act of 1880 (Chap. 269, Laws of 1880) to reduce an assessment on real estate for the year 1887, it appeared that in 1885 and 1886, the assessors had assessed the land at the same sum, that in similar proceedings in each of those years, there had been a judicial determination fixing the actual value, and that the prior assessment had been reduced to the sum so fixed. *Held*, that in the absence of evidence of an increase of value or of some change affecting the assessable value, the doctrine of *res adjudicata* applied, and the former adjudications were binding and conclusive. *People ex rel. v. Carter.* 557
3. After the writ of certiorari was issued, the assessment-roll having been placed in the hands of the proper officer for collection, the relators paid the taxes imposed upon the property, leaving, however, with the officer a writing, stating that the taxes were paid under protest, for the reason that the assessment was excessive and that for the correction thereof, proceedings were then pending. *Held*, that in the absence of any evidence as to the circumstances under which the payment was made, the presumption was, that

the payment was involuntary, and so, did not estop the relators. *Id.*

4. Where the evidence in proceedings against an officer of the police force of New York city, charged with "conduct unbecoming an officer" fails to show any breach of discipline or conduct unbecoming an officer, the case presents a question of law reviewable by the General Term on certiorari and also reviewable here. *People ex rel. v. French.* 493.

CHATTEL MORTGAGE.

1. In an action brought by plaintiff as receiver of the P. H. S. & I. Co., the complaint alleged in substance that said company executed to defendant's firm chattel mortgages on all its property, consisting of buildings, machinery, tools, etc.; that default having been made in payment, defendants took possession of the property and sold it at auction, they bidding it in for \$1,000; that none of the property was in view of the persons attending the sale; that it was all put up in a lump and sold together at the request of defendants, although they knew it could be sold in parcels, and greater sums realized for it if so sold; that none of the company's officers were present; that since the sale defendants have claimed to own the property and have sold \$10,000 or \$15,000 of it; that at the time of the sale the property was worth about \$60,000, and the company's indebtedness to defendants did not exceed \$20,000. The relief asked was that defendants be required to account for the value of the property, and after application of sufficient to extinguish the debt secured that plaintiffs have judgment for the balance. A demurrer to the complaint was sustained because of the omission of an averment of a tender to defendants of the amount conceded to be due and unpaid on the mortgages, or an offer to pay that amount on its being ascertained. *Held*, error; that the sale to defendants was voidable and could be vacated and set aside as part of the relief

in this action; that the amount received by defendants on the sales made by them was applicable and must be deemed to have been applied upon the mortgages, and the property remaining in their hands to be held as security for the balance due; that a tender before suit, or an offer in the complaint to pay was not necessary and the omission thereof was only important as bearing upon the question of costs; that the facts alleged in the complaint were sufficient to show a right of redemption in plaintiff and the action should be treated as one to redeem and for such incidental relief as is necessary to accomplish the redemption. *Casserty v. With-erbee.* 522

2. *It seems* that in such an action payment of the amount found due should be required by the judgment, upon, and as a condition of redemption, and that a dismissal of the complaint on default of payment under the judgment would operate as a foreclosure. *Id.*

3. *It seems*, also, the fact that on foreclosure of a chattel mortgage the mortgagee becomes the purchaser, does not itself render the sale void. *Id.*

CODES.

See CODE OF CIVIL PROCEDURE.
CODE OF CRIMINAL PROCEDURE.

CODE OF CIVIL PROCEDURE.

405	{	<i>Hill v. Supra. Rens. Co.</i>	344
414			
488	{	<i>Sullivan v. N. Y. & R. C. Co.</i>	348
498			
499			
636	{	<i>Buell v. Van Camp.</i>	160
713			
724	{	<i>Colwell v. G. N. Bank.</i>	408
731			
732	{	<i>C. E. Bank v. Blye.</i>	414
1236			
1237	{	<i>Taylor v. B. E. R. Co.</i>	561
1282			
1298	{	<i>Good v. Daland.</i>	153
1331			
1393	{	<i>C. E. Bank v. Blye.</i>	414
	{	<i>Carr v. Rischer.</i>	117
	{	<i>Werner v. Tuch.</i>	632
	{	<i>Y. C. N. Bank v. Carpenter.</i>	550

1704	{	<i>Martin v. Gilbert.</i>	298
1717			
1769	{	<i>McBride v McBride.</i>	519
1778			
2383	{	<i>Shorer v. T. P. & P. Co.</i>	483
2140			
2606	{	<i>N. Y. L. & W. W. Co. v. Schneider et al.</i>	475
2514			
2715	{	<i>People ex rel. v. French.</i>	502
2726			
2727	{	<i>In re Clark</i>	427
	{	<i>In re Wiley</i>	642
	{	<i>Matter of Wagner.</i>	28

CODE OF CRIMINAL PROCEDURE.

491.	{	<i>People ex rel. v. Durston.</i>	569
492.			
503.			
504.			
505.			
506.			
507.	{	<i>People ex rel. v. Supra. West. Co.</i>	126
508.			
509.			
721.			
725.			

CONFESSION OF JUDGMENT.

In a confession of judgment it was stated that \$600 of the original debt had been paid. It appeared that only \$350 of the debt had been paid in cash and that the debtor had assumed payment of a debt of \$250 owed by his creditors to a third party. *Held*, that the statement was true, as the assumption of the debt amounted to a payment of its amount. *Rutherford v. Schattman.* 604

CONSPIRACY.

On trial of an action to set aside an instrument on the ground of conspiracy and fraud, in the absence of any proof connecting a person not a party to the action with the alleged conspiracy, his acts or declarations are immaterial and inadmissible; to make them competent, *prima facie* evidence must first be given of the existence of the conspiracy, and of the connection of the person whose acts and declarations are sought to be proved. *Rutherford v. Schattman.* 604

CONSTABLE.

1. A constable or sheriff in executing a certificate of a judgment of conviction issued to him as prescribed by the Code of Criminal Procedure (§§ 721, 725) is engaged in a criminal proceeding within the meaning of the act, "to reduce the number of town officers and town and county expenses," etc. (Chap. 180, Laws of 1845, as amended by chap. 455, Laws of 1847), and the fees and expenses of the officer are included in the provisions of said act (§ 26, as amended), charging the expenses of certain criminal proceedings under the grade of felony upon the town or city where the offense was committed. *People ex rel. v. Supra. West. Co.* 126
2. Accordingly, *held*, that the account of a constable for fees and expenses in conveying to a penitentiary prisoners convicted and sentenced in the Court of Special Sessions of his town were a town and not a county charge, and so that a refusal of the board of supervisors of the county to audit it as a county charge was proper. *Id.*

CONSTITUTIONAL LAW.

1. An act passed in 1887 (Chap. 205, Laws of 1887), which by its title is declared to be "An act to legalize the acts and proceedings" of the town board of auditors, commissioner of highways and of a town meeting in the town of Attica in relation to the erection of a certain bridge, which had been erected under a contract with the highway commissioner, after legalizing said acts and proceedings, contains a provision that it shall not be considered as requiring the town to pay the contract-price, but empowers the contractor to bring suit against the town to recover fair and reasonable compensation for the work and material. *Held*, the provision is within the scope of the subject expressed in the title, and so is not violative of the provisions of the State Constitution (art. 3, § 16), prohibiting the passage of any private or local act embracing more than one subject

and requiring that to be expressed in the title. *W. I. B. Co. v. Town of Attica.* 204

2. Also, *held*, that said act is not repugnant to the provisions of said Constitution (Art. 3, § 18), prohibiting the passage of a private or local bill providing for building bridges, or the provision (Art. 3, § 18) requiring that in an act authorizing taxation the purpose of the tax shall be stated. *Id.*
3. The legislature has power to legalize and validate a claim, supported by a moral obligation and founded in justice, against a town, which has already been declared invalid by the courts, because of failure on the part of the town officers to pursue strictly the prescribed statutory proceedings. *Id.*
4. The state legislature has power to declare places or property used to the detriment of public interests or the injury of the health, morals or welfare of the community, public nuisances, although not such at common law. *Lawton v. Steele.* 226
5. *It seems*, however, this power may not be used as a cover for withdrawing property from the protection of the law, or, arbitrarily, where no public right or interest is involved in declaring property a nuisance for the purpose of devoting it to destruction, and if the court can judicially see that the statute is a mere evasion or was framed for the purpose of individual oppression, it may be set aside as unconstitutional. *Id.*
6. The legislature has power to regulate and control the right of fishing in the public waters of the state, and in the exercise of this power may prohibit the taking of fish with nets in specified waters, and by its declaration, make the setting of nets for that purpose a public nuisance. *Id.*
7. Where a public nuisance consists in the location or use of tangible personal property, so as to interfere with or obstruct a public right or regulation, the legislature may authorize its summary abatement

by executive agencies without resorting to judicial proceedings; and any injury to or destruction of the property necessarily incident to the exercise of the summary jurisdiction, interferes with no legal right of the owner, and is not violative of the constitutional prohibition against depriving the owner of his property without due process of law. *Id.*

8. The legislature, however, may not decree the destruction or forfeiture of property used so as to constitute a nuisance, and appoint officers to execute its mandate as a punishment of the wrong or even to prevent a future illegal use of the property, it not being a nuisance *per se.* *Id.*

9. Where provisions of a statute are separate and one is unconstitutional, while the others are valid, the latter will be sustained and the former only rejected. *Id.*

10. The provisions of the Code of Criminal Procedure (§§ 491, 492, 503, 504, 505, 506, 507, 508 and 509, as amended by chap. 489, Laws of 1888) changing the mode of inflicting the death penalty do not upon their face, nor in their general purpose and intent, violate any provision of the Constitution. *People ex rel. v. Durston.* 569

11. *It seems*, that under the provision of the state Constitution (Art. 1, § 5) forbidding the infliction of cruel and unusual punishments, the courts have power to declare void any legislative acts prescribing punishment for crime in fact cruel and unusual. *Id.*

12. The legislature, however, has power to change the manner of inflicting the death penalty; this is not a change of punishment, but simply of the mode. *Id.*

13. Whether the use of electricity as an agency for producing death constituted a more humane method of execution than that formally used was a question for the legislature, and its determination in regard thereto is conclusive. *Id.*

14. The courts have no power to

take proof as to the constitutionality of a statute, and extraneous testimony either of experts or other witnesses is not admissible to show that in carrying it out, some provision of the Constitution may be violated. If it cannot be made to appear that the statute is unconstitutional by argument deduced from the language of the law itself, or from matter of which the court can take judicial notice, it must stand. *Id.*

15. Punishment by death is not cruel within the meaning of the constitutional prohibition (Art. 1, § 5) against the infliction of cruel and unusual punishments; and while the infliction of the death penalty by a new agency is unusual the adoption of such an agency which is not a certainly prolonged or torturous procedure, is not violative of the constitutional provision. *People v. Kemmler.* 580

CONSTRUCTION.

1. In considering the extent of the rights of the respective parties in the grant of a right of way, it is not proper to refer to the parol negotiations which preceded or accompanied its execution, but the language of the grant should be regarded, and when that is uncertain or ambiguous, the circumstances surrounding it and the situation of the parties, with a view of arriving at the true intent of the parties. *Herman v. Roberts.* 37

2. Statutes changing the common law are to be strictly construed, and it will be held to be no further abrogated than the clear import of the language used in the statutes absolutely requires. *Dean v. M. E. R. Co.* 540

CONTINUANCE OF ACTION.

See ABATEMENT AND REVIVAL.

CONTRACT.

1. Where a contract is rescinded while in course of performance,

- no claim in respect of performance, or of what has been paid or received thereon may thereafter be made, unless expressly or impliedly reserved upon the rescission. *McCreery v. Day.* 1
2. Whatever, under the former system of procedure, would have constituted a good ground in equity for restraining the enforcement of a covenant or decreeing its discharge will now constitute a good equitable defense to an action on the covenant itself. *Id.*
3. A substantial parol agreement followed by actual performance, whether made and executed before or after breach of a covenant in the original contract, is a good accord and satisfaction of the covenant. So, also, a new agreement, although without performance, if based on a good consideration, will be a satisfaction if accepted as such. *Id.*
4. A contract under seal may be annulled by a substituted parol agreement followed by actual performance. *Id.*
5. In 1887 plaintiff, with other corporations engaged in the manufacturing of carbon, entered into a contract with H., the object of which was, by a combination, to vest in H., as a common trustee, the management and control of the business of manufacturing and selling their products. The several companies agreed to lease to such trustee their respective factories, and operate them under his direction. He was to designate the kind of goods to be manufactured, fix the prices at which and the persons to whom they should be sold, and, after paying expenses, divide the net proceeds and profits as provided in the contract. When this contract was made plaintiff had an outstanding contract to furnish carbons to the B. E. L. Co. from time to time. Plaintiff assigned to H., as such trustee, all existing contracts, and he assumed their performance. Carbons manufactured at plaintiff's factory in April, May and June, 1887, were billed in the name of H., and delivered under said contract to the B. E. L. Co. About July, 1887, plaintiff refused to continue in the combination, and an action was commenced against the trustee and the contracting corporations to dissolve the same, which resulted in the appointment of defendant as receiver of its property. In an action brought by plaintiff to recover for said carbons, the B. E. L. Co. paid the amount into court. The court found that the contract to combine was made for unlawful purposes, and was illegal; that the trust was then insolvent, and its assets, including the claim against the B. E. L. Co., insufficient to pay its creditors. *Held*, that, as between the plaintiff and the receiver, the latter was entitled to the fund; that plaintiff stood in the position of a party to an illegal contract claiming a fund, which, if the contract was valid, belonged to the trust combination, and to sustain the action would permit it to escape from the operation of the rule which denies affirmative relief to a party to an illegal contract. *P. C. Co. v. McMillen.* 46
6. As to whether, if the B. E. L. Co. had not paid the funds into court, plaintiff could have enforced a recovery against it, although there was no adverse claimant, *quære.* *Id.*
7. H., plaintiff's assignor, entered into a contract with defendant for regulating and grading one of its streets. By the contract, plaintiff agreed to complete the work in 320 days after its commencement, and in case of failure so to do, to pay inspectors' wages for excess of time employed. It was stipulated that in computing the time "the total time during which the work of completing the contract is delayed in consequence of any act or omission" of defendant, which, it was stated, should be determined and certified to by the commissioner of public works, should be excluded. The work was not completed in the 320 days and defendant retained the inspectors' fees for the extra time. In an action to recover, among other things,

the amount so retained, plaintiff claimed that the work was delayed because of obstructions left by defendant on the street, and that it was completed within 320 days after their removal. *Held*, that by the terms of the contract it was a condition precedent to any right of the contractor to be relieved from the allowance of inspectors' fees, to have the matter submitted to and determined by the commissioner, and in the absence of proof that this had been done, or that the commissioner had been called upon but had neglected or refused to act, plaintiff could not recover. *Phelan v. Mayor, etc.* 86

8. Plaintiff also claimed to recover for damages sustained because of the defendant's delay in removing the obstructions. Upon receiving the final payment, plaintiff executed to the city a release of and from all actions, causes of action, damages, etc., which he had resulting or arising from the contract. *Held*, that the release was a good defense to the claim. *Id.*

9. While the common-law rule that the contract relations of master and servant are dissolved by the death of either party, has been limited, it still applies in cases in which the relation may be deemed purely personal and involves neither property rights nor independent action; it applies both to the contract of the master and to that of the servant, and includes as well cases where the services are those of unskilled as where they are of skilled labor. *Lacy v. Getman.* 109

10. Plaintiff contracted orally with McM., defendant's testator, to work upon his farm as an ordinary farm laborer for one year, commencing in March. Plaintiff entered upon the service and worked under the direction of McM. until in July, when the latter died, leaving a will by which he gave his widow a life estate in the farm and the use and control for life of all his personal property in the house and on the farm. Plaintiff knew in a general way

the terms of the will; he continued on without being hired or employed by McM.'s executrix until the close of the year, doing the farm work under the direction of the widow. In an action against the executrix to recover for his services for the whole year, *held*, that upon the death of McM. the contract terminated, and the plaintiff was only entitled to recover the proportionate amount earned at the death of McM. *Id.*

11. In an action to recover damages for the alleged breach of a contract, the complaint alleged that in August, 1884, the plaintiffs S. and F., with E. and B. as joint contractors, entered into a contract, in writing, with defendant to construct a tunnel in its quarry for a certain amount per foot; that prior to any breach thereof, E. and B., with consent of defendant and of S. and F., abandoned the work, leaving further performance to the latter, who continued it and received, from time to time, the contract price, as the work progressed; that on January 2, 1885, D., the other plaintiff, became, with the consent of defendant and S. and F., one of the contracting parties, and was substituted in place of E. and B., by formally executing the original contract; that on December 20, 1885, plaintiffs, at defendant's request, consented to a suspension of the work for two weeks; at the end thereof, they presented themselves at the tunnel, and at defendant's place of business, and offered to resume work under the contract, but defendant would not permit them to do so, and, from day to day thereafter, they notified defendant of their willingness to do so, but the latter would not permit them, and they were compelled to seek other employment. Defendant set up as a defense a default of parties plaintiff, in that E. and B., who were still living, were not joined as plaintiffs. *Held*, that the connection of E. and B. with the contract and the work was fairly disclosed by the allegations of the complaint; that, under the circumstances, it did not appear that when the action was commenced

they had any interest in the contract; but that if there was a defect of parties plaintiff it appeared upon the face of the complaint, and defendant could only object by demurrer, and not having done so, the objection was waived (Code Civ. Pro. §§ 488, 498, 499); that it was not necessary that the complaint should show, affirmatively, that E. and B. were living at the commencement of the action in order to make the complaint demurrable, as the presumption of life applies. *Sullivan v. N. Y. & R. C. Co.* 348

12. As to the breach alleged there was a conflict of evidence, plaintiffs claiming that the suspension was for two weeks only, defendant that no time was specified, or in any event the work was not to be resumed until the commencement of other work on the quarries, which had been suspended at the same time. It appeared that, on December 18, 1885, defendant's agent and plaintiffs agreed to a temporary suspension of the work, and plaintiffs were paid the amount due up to that time. Two weeks after the suspension plaintiffs had several conversations with defendant's agent about a resumption. According to plaintiffs' version they expressed a desire to go on, but defendant fixed no time for resumption. The other work was not fully resumed until January 25, 1886. On February 11, plaintiffs wrote to defendant demanding a definite answer, whether they were to be permitted to perform the contract, stating that they were ready to complete it and requesting an immediate reply. On February 19, defendant claimed it caused verbal notice to be given to plaintiffs that they were at liberty to resume work under the contract. Between the date of plaintiffs' letter and such notice the plaintiffs had obtained employment elsewhere. On February 24, defendant's agent wrote to plaintiffs notifying them to proceed with the work under the contract. This they refused to do, unless compensated for their damages caused by the unreasonable suspension of the work. *Held*, that the question as to how long the

work was to be actually suspended, and whether defendant's delay in omitting to notify plaintiffs to resume work after request was unreasonable, was properly submitted to the jury; and they having found in favor of plaintiffs, that a breach of the contract was established. *Id.*

13. In an action for the specific performance of an alleged agreement for the leasing of certain premises by defendant to plaintiff, the making of which plaintiff denied, the only evidence to establish the agreement was certain letters, one from plaintiff offering to lease the premises for a term of years at a rent specified, the buildings thereon to be altered similar to those a certain firm named "is now altering, * * * plans, etc., to be mutually agreed upon;" a reply from defendant acknowledging receipt of plaintiff's letter, and saying "I hereby accept your offer," and a letter from him four days later in which he states his counsel advises him "that there are difficulties which will prevent the making of a lease as proposed," adding, "you will, therefore, understand that the proposed lease cannot and will not be made." *Held*, that said letters did not constitute a completed agreement to lease; but an agreement in substance that, if the parties should thereafter agree upon plans for the alteration of the building, a lease would be given upon the terms specified; that it was immaterial what reason defendant gave, or what motive actuated him in his refusal to agree upon plans; that he had a right to insist upon such an agreement before plaintiff's right to demand a lease should arise; also, that plaintiff was not entitled to waive the condition as to alterations, and to demand a lease without an agreement as to plans. *Mayer v. McCreery.* 434
14. The rule which rejects parol evidence when offered with respect to written contracts, has no application to a case where, of an original agreement which has been executed, a part only is in writing and the remainder is verbal. *Routledge v. Worthington Co.* 592

15. The written memorandum of a contract required by the Statute of Frauds must contain, within itself or by reference to other writings, all the essential elements of a contract, and when it comes up to these requirements, neither party will be permitted to show that the contract was other or different than that stated. *Id.*

16. If, however, the writing is insufficient, but there has been such a performance as to take the case out of the operation of the statute, oral evidence is admissible to supply omissions and to establish what were the contractual relations of the parties. *Id.*

17. In an action to recover for certain publications sold by plaintiff to defendant, plaintiff produced evidence in an agreement signed by defendant by which it agreed to take the publications at a price specified, amounting to \$4,000. It appeared that after the parties had come to an agreement in regard to the sale, defendant at plaintiff's request for a formal order executed the writing. Defendant set up as a counter-claim, and offered to prove by oral evidence that plaintiff agreed in consideration of the purchase, and as part of the agreement, that the trade-price at which they sold the publication should not be lowered, and claimed damages for a breach of that agreement. The testimony was rejected. *Held*, error; that the writing represented a part only of the contract, that is defendant's undertaking, while that of plaintiff rested simply in parcel; that there was in fact no valid contract between the parties; but as it had been executed, this took the agreement out of the Statute of Frauds, and left the parties subject to and bound by the terms of the actual agreement made. *Id.*

See COVENANTS.
GUARANTY.
INSURANCE (FIRE).
INSURANCE (LIFE).
LEASE.
PRINCIPAL AND AGENT.
SALES.

CONVERSION.

1. One S., a rubber broker, by means of false and fraudulent representations that he had effected a sale of a quantity of rubber for plaintiff, obtained from him a delivery order for the rubber, then on board of a steamboat, for the purpose of delivery to the alleged purchaser. By means of such order S. obtained possession of the rubber, stored it and took a warehouse receipt therefor in his own name, which he delivered to defendant to secure an advance, to be paid on sale of the rubber. Defendant sold, and after deducting the advance, paid over the balance to S. In an action to recover possession of the rubber, *held*, that S. obtained possession by a larceny; and so, that defendant acquired no title and was liable for a conversion. *Soltau v. Gerdau*. 380

2. Upon trial of an action to recover for the alleged unlawful conversion of a quantity of oil placed in defendant's possession for storage by W. and M. and which defendant, upon demand and after notice of plaintiff's claim, refused to deliver, plaintiff, to establish his title, introduced in evidence a judgment-roll in an action brought by W. and M. against him, in which the title to the oil was in issue, and it was decided that plaintiff here was owner. The referee held that said judgment conclusively established plaintiff's right to the oil, and excluded evidence offered by the defendant to dispute said right. *Held*, no error. *Hughes v. U. P. Lines*. 423

3. Oil in the earth belongs to the owner of the land, and when unlawfully taken therefrom by a wrong doer the title of such owner remains perfect, and he may pursue and reclaim the property wherever he may find it. *Id.*

CORPORATIONS.

1. In an action upon certain promissory notes made payable to defendant, a domestic corporation, and in-

dorsed by L., as its president, it appeared that the defendant had its main office in the city of New York, and while a portion of its business was transacted and most of its purchases and sales were made in other states and countries its principal business operations were carried on in that city, and the annual meetings of its directors were there held. L. was its president and treasurer, the general manager of all its business affairs in said city, and the only officer in attendance at its office there; he paid the current accounts of the company, indorsed checks made payable to its order. The discount of business paper and the use of its money for its purposes, and the account of the same on its cash books were daily and permitted transactions. Defendant had no cash capital, and its working capital was borrowed on the credit of the company; this was done principally by L., and mainly by the use of paper indorsed by him in its name; the evidence tended to show that this was with the knowledge and acquiescence of the directors. *Held*, that the evidence required the submission of the question of the authority of L. to bind defendant by indorsements, to the jury; and that a dismissal of the complaint on trial was error. *F. N. Bank v. N. P. Co.* 256

2. The provision of the Code of Civil Procedure (§ 1778), declaring that, in an action against a corporation "to recover damages for the non-payment of a promissory note, or other evidence of debt for the absolute payment of money upon demand, or at a particular time, * * * unless the defendant serves with a copy of his answer or demurrer, a copy of an order of a judge directing that the issues presented by the pleadings be tried, the plaintiff may take judgment, as in case of default in pleading, at the expiration of twenty days," does not apply to an action wherein it is sought to charge a corporation as indorser of a promissory note; it is to be confined strictly to actions upon instruments which admit on their face an existing debt pay-

able absolutely. *Shorer v. T. P. & P. Co.* 483

See BUSINESS CORPORATIONS.
 INSOLVENT CORPORATIONS.
 INSURANCE (FIRE).
 INSURANCE (LIFE).
 MANUFACTURING CORPORATIONS.
 MUNICIPAL CORPORATIONS.
 RAILROAD CORPORATIONS.

COSTS.

1. The allowance of costs, upon a reference under the statute of a disputed claim against an estate, is within the discretion of the court below, and is not reviewable here. *Haurhurst v. Ritch.* 621
2. In proceedings under the act of 1880 (Chap. 269, Laws of 1880), to review an assessment, where it appears to the court that the assessors have acted "with gross negligence," costs may be awarded against them. *People ex rel v. Carter.* 654

COUNTIES.

1. Where a county treasurer, instead of applying taxes assessed on the property of a railroad corporation in a town to the payment or redemption of bonds of the town, issued in aid of the construction of the road of such corporation, as required by the act of 1869 (Chap. 907, Laws of 1869), as amended in 1871 (Chap. 283, Laws of 1871), applied them in payment of county and state taxes, with and as part of, other moneys raised by the town for these purposes, *held*, that an action as for money had and received, was maintainable on behalf of the town against the county to recover the money so misappropriated; that the liability included as well the portion of the funds applied in payment of the state tax as that applied for other county purposes; also, that the action was properly brought by the supervisor of the town in his name as its representative. *Strough v. Suprs. Jeff. Co.* 212
2. Also, *held*, the fact that the supervisors of the town for the period

- of fourteen years were apprised from year to year, while sitting as members of the board of supervisors of the county, of the misappropriation and made no objection thereto, did not estop the town from claiming a repayment of the money. *Id.*
3. A county treasurer, in the payment of state taxes to the state comptroller, acts as agent for the county, and pays on its behalf. *Id.*
4. In an action, under the act of 1855 (Chap. 428, Laws of 1855), to recover compensation for property destroyed in consequence of a mob or riot, it appeared that an action was begun in the County Court for the same cause within the three months limited by said act, in which the complaint was dismissed for want of jurisdiction in that court to entertain actions brought to recover a sum exceeding \$1,000; thereafter, this action was commenced, but after the lapse of the statutory period. *Held*, that the action was not maintainable; that as it was brought under special law and was maintainable solely by its authority, the limitation was so incorporated with the remedy given as to make it an integral part of it and was a condition precedent to the maintenance of the action at all; and that the provision of the Code of Civil Procedure (§ 405) providing that when an action is commenced within the time limited and is terminated "in any other manner than by voluntary discontinuance, dismissal for neglect to proceed, or a final judgment on the merits, the plaintiff may commence a new action for the same cause within one year after," such termination, did not apply. (See § 414.) *Hill v. Suprs. Rens. Co.* 844
- issued in aid of the construction of the road of such corporation, as required by the act of 1869 (Chap. 907, Laws of 1869), as amended in 1871 (Chap. 283, Laws of 1871), applied them in payment of county and state taxes, with and as part of, other moneys raised by the town for those purposes, *held*, that an action, as for money had and received, was maintainable on behalf of the town against the county to recover the money so misappropriated; that the liability included as well the portion of the funds applied in payment of the state tax as that applied for other county purposes; also, that the action was properly brought by the supervisor of the town in his name as its representative. *Strough v. Suprs. Jeff. Co.* 212
2. A county treasurer, in the payment of state taxes to the state comptroller, acts as agent for the county, and pays on its behalf. *Id.*
3. Under and by the provision of the act of 1881 (Chap. 557, Laws of 1881) declaring that every county treasurer thereafter elected or appointed in the county of Erie, "shall receive, as compensation for his services," an annual salary to be fixed before he enters upon the duties of his office, the six months' limitation of the act of 1877 (Chap. 436, Laws of 1877) became inapplicable, and it became lawful for the board of supervisors to fix the next treasurer's salary at any time before his election, and the salary, so fixed, is the only compensation he is entitled to for the entire and complete performance of all his official duties. *Suprs. Erie Co. v. Jones.* 339
4. Accordingly, *held*, that defendant, who was elected county treasurer at the November election in said county, following the passage of said act of 1881, the board of supervisors having previously fixed his salary, was only entitled to the salary so fixed; and he having withheld the fees collected by him and refused to pay the same over to the county, which, under the act of 1880 (Chap. 233, Laws

See ERIE (COUNTY OF).

COUNTY TREASURER.

1. Where a county treasurer, instead of applying taxes assessed on the property of a railroad corporation in a town to the payment or redemption of bonds of the town,

of 1880) was entitled to them, that an action was maintainable against him, on behalf of the county, by its board of supervisors, to recover the same. *Id.*

COURTS.

See SURROGATES' COURTS.

COVENANTS.

1. Whatever, under the former system of procedure, would have constituted a good ground in equity for restraining the enforcement of a covenant or decreeing its discharge, will now constitute a good equitable defense to an action on the covenant itself. *McCreery v. Day.* 1
2. A substituted parol agreement followed by the actual performance, whether made and executed before or after breach of a covenant in the original contract, is a good accord and satisfaction of the covenant. So, also, a new agreement, although without performance, if based on a good consideration, will be a satisfaction if accepted as such. *Id.*

CREDITOR'S SUIT.

Where, on trial of an action to set aside a conveyance of real estate made by an insolvent debtor, as executed to hinder, delay and defraud creditors, the court excluded evidence offered by plaintiff to the effect that prior to the conveyance, bankruptcy proceedings had been commenced against the grantor and an order issued therein restraining him from making any distribution of the property, *held*, no error. *Talcott v. Harder.* 536

CRIMINAL PROCEEDINGS.

A constable or sheriff in executing a certificate of a judgment of conviction issued to him as prescribed by the Code of Criminal Procedure (§§ 721, 725) is engaged in a criminal proceeding within the meaning of the act, "to reduce the

number of town officers and town and county expenses," etc. (Chap. 180, Laws of 1845, as amended by chap. 455, Laws of 1847), and the fees and expenses of the officer are included in the provisions of said act (§ 26, as amended), charging the expenses of certain criminal proceedings under the grade of felony upon the town or city where the offense was committed. *People ex rel. v. Suprs. West. Co.* 126

CRIMINAL TRIALS.

1. Upon the trial of an indictment for murder, evidence was admitted as to quarrels between defendant and deceased and as to conversations between them. *Held*, proper, as tending to show the existence of motive. *People v. Kemmler.* 580
2. Physicians who had been sent to the jail by the district attorney to make an examination of the prisoner were permitted to testify, as witnesses for the prosecution, to his mental condition, under the objection that either the relation of patient and physician existed, or else the prisoner was compelled to furnish evidence against himself. *Held*, no error; no evidence having been called for as to the prisoner's statements or as to transactions in the jail. *Id.*
3. The court was requested, but refused, to charge that in fixing the grade of crime, evidence of intoxication was important, and must be carefully weighed; but did charge that all the evidence in the case was to be weighed; that it was not the province of the court to state what evidence is important or otherwise, that being for the jury to determine. *Held*, no error; that while, it seems it would not be improper for the court to characterize the evidence of a fact as important, and give its opinion as to its weight if the question was fairly left to the jury, it was under no obligation to do so. *Id.*
4. The jury after its retirement, desired additional instruction as to

the grade of the crime and as to certain evidence, which was given without objection, the court reading certain portions of the evidence. The additional instructions covered no more than did the main charge and simply pointed out the proofs which bore upon the act of killing. *Held*, no error. *Id.*

DAMAGES.

1. In a proceeding by reference to ascertain the damages sustained by a party in consequence of an injunction restraining him from exercising some legal right, it is proper to allow as part of the damages the expenses incurred upon the reference. *Holcomb v. Rice* 598
2. In proceedings to assess damages upon an undertaking given by plaintiff, in an action to set aside a bond and mortgage, in accordance with the condition of an order granting a temporary injunction to restrain a foreclosure, it appeared that there remained, after paying the costs of the foreclosure, the costs of the action and the deficiency upon the sale, in accordance with the terms of the undertaking, a margin sufficient to cover the damages allowed upon confirmation of the referee's report. The sureties bid in the property on the foreclosure sale and sought to include as a payment on account of the undertaking, the amount of their bid; this was disallowed. *Held*, no error; that the purchase of the premises by the sureties to protect themselves did not affect the question of the damages assessable against them. *Id.*
3. In an action against a railroad corporation to recover damages because of its interfering with plaintiff's rights in a street adjoining his premises, plaintiff is not entitled to a recovery for permanent diminution in value of the premises; but only damages sustained prior to the commencement of the action. *Ottenot v. N. Y., L. & W. R. Co.* 603

DEATH.

1. While the common-law rule that the contract relations of master and servant are dissolved by the death of either party, has been limited, it still applies in cases in which the relation may be deemed purely personal and involves neither property rights nor independent action; it applies both to the contract of the master and to that of the servant, and includes as well cases where the services are those of unskilled as where they are of skilled labor. *Lacy v. Getman.* 109
2. Plaintiff contracted orally with McM., defendant's testator, to work upon his farm as an ordinary farm laborer for one year, commencing in March. Plaintiff entered upon the service and worked under the direction of McM. until in July when the latter died, leaving a will by which he gave his widow a life estate in the farm and the use and control for life of all his personal property in the house and on the farm. Plaintiff knew in a general way the terms of the will; he continued on without being hired or employed by McM.'s executrix until the close of the year, doing the farm work under the direction of the widow. In an action against the executrix to recover for his services for the whole year, *held*, that upon the death of McM. the contract terminated, and the plaintiff was only entitled to recover the proportionate amount earned at the death of McM. *Id.*
3. Under the provision of the act of 1875, providing for the organization of certain business corporations (§ 37, chap. 611, Laws of 1875), which makes the stockholders "in limited liability companies" individually liable "to an amount equal to the amount of stock held by them respectively" for all the debts of the company, until the whole amount of capital stock has been paid in and a certificate thereof made and recorded, the liability so imposed is not penal, but is in the nature of a contract obligation, and so it survives the death of a stockholder, and con-

tinues against his personal representatives. *Cochran v. Wiechers.* 399

4. The provisions of the Code of Criminal Procedure (§§ 491, 492, 503, 504, 505, 506, 507, 508 and 509, as amended by chap. 489, Laws of 1888) changing the mode of inflicting the death penalty, do not upon their face, nor in their general purpose and intent, violate any provision of the Constitution. *People ex rel. v. Durston.* 569

5. The legislature, however, has power to change the manner of inflicting the death penalty; this is not a change of punishment, but simply of the mode. *Id.*

6. Whether the use of electricity as an agency for producing death constituted a more humane method of execution than that formally used was a question for the legislature, and its determination in regard thereto is conclusive. *Id.*

— When action does not abate absolutely on death of party.
See Carr v. Rischer. 117

DEBTOR AND CREDITOR.

See CREDITOR'S SUIT.
FRAUDULENT CONVEYANCES.

DECEIT.

See FRAUD.

DEED.

1. H., plaintiff's testator, being the owner of land upon which was a residence built for and used as a gentleman's country seat, obtained from defendant, by purchase and grant, a right of way from said land to a public highway across the farm of the latter, over a piece of land described. The premises of H. had no other connection with the highway than the way thus granted. The land described in the grant, over which the way was granted, was, at the time, rocky and uneven, not adapted to purposes of cultivation,

or for a carriage-way, until prepared for that purpose. H. prepared a road-bed, constructed thereon a carriage-way, fences were built on both sides, with openings on either side, so that defendant might cross the road. Defendant thereafter used the roadway for carrying heavy loads of farm produce and utensils over it, thus injuring the road, and also placed stones thereon which obstructed the passage, and he threatened to continue such use whenever he deemed necessary. *Held*, that plaintiff was entitled to an injunction to restrain such improper use of the way; that the grant gave plaintiff not only a right to an unobstructed passage at all times over the land marked out for the way, but also all such rights as were incident or necessary to such passage; that plaintiff thus acquired the right to enter upon the land and construct such a road as he desired, and to restrict such use of it by the owner of the servient tenement, as was inconsistent with the full and unrestricted enjoyment of his easement; that the full extent of the rights of the grantor was to enter upon the land and do such acts only as should not injure or impair the usefulness of the road so constructed, or its character as a carriage road for private use; also, that the grantee had a right, not only to a free passage over the traveled part, but also over the whole strip granted and enclosed as a way; and that the deposit of stones or other obstructions on any part of the enclosure, in such a way as to interrupt the enjoyment of the easement, was inconsistent with and an infringement upon the grantee's rights, and could properly be prevented by injunction. *Herman v. Roberts.* 37

2. But *held*, defendant was not precluded from the use of the roadway, by passing over or across it in such a manner as not materially to obstruct passage or injure the road-bed. *Id.*

3. The provision of the Revised Statutes (1 R. S. 737, § 124), declaring that "every instrument executed by the grantee of a power, conveying an estate, or creating a

charge which such grantee would have no other right to convey or create, unless by virtue of his power, shall be deemed a valid execution of the power, although such power be not recited or referred to therein," was not intended to change then existing rules; and whenever, in addition to the power, the grantee has an independent interest in the property, whether legal or equitable, the rule of the statute does not apply, and the instrument will not be deemed an execution of the power, but only a conveyance of the independent interest. *M. L. Ins. Co. v. Shipman.* 324

4. The possession of a deed by the grantee is *prima facie* evidence of delivery, when there is nothing to impeach the *bona fides* of his possession. *Strough v. Wilder.* 530

5. In an action for partition, plaintiff claimed title, under deeds, from the heirs of S. W., who died intestate. The defendant G. W., a son of the deceased, claimed under a deed from her, which was neither acknowledged nor its execution attested by a subscribing witness; its execution was proved by two witnesses who were present at the time, and no attempt was made to show that her signature thereto was not genuine. The fact of delivery was not directly proved, but defendant produced the deed and proved that it was drawn by a scrivener, pursuant to the directions of the grantor. Two witnesses testified to declarations of S. W., to the effect that she intended G. W. to have the premises described in the deed, and, that from the time of its execution until S. W.'s death, several years thereafter, it was in the custody of G. W. It also appeared that G. W. rented the premises to others, paid taxes and made repairs, and during his mother's life, after the deed had been executed, exercised such control over the property as usually attends ownership. *Held*, the testimony justified a finding that the deed was executed and delivered. *Id.*

6. Also *held*, that plaintiff was not a "purchaser" within the provision

of the Revised Statutes (1 R. S. 738, § 137), which declares that an unacknowledged and unattested deed "shall not take effect as against a purchaser or incumbrancer until so acknowledged;" that the title under the deed was good, as between the parties, and also, against her heirs or one claiming from them, as the grantor, on her death, was, neither seized nor had she any title to the land in question, and the heirs took and could convey nothing. *Id.*

7. An heir who takes by descent is not a purchaser in the eye of the law and does not hold the estate descended by purchase. *Id.*

8. The word "purchaser," in said statute, means one who derives title by purchase from the grantor in the unacknowledged and unattested deed, or from one who, himself, is either mediately or immediately a purchaser from such grantor. *Id.*

DEFENSES

Whatever, under the former system of procedure would have constituted a good ground in equity for restraining the enforcement of a covenant or decreeing its discharge, will now constitute a good equitable defense to an action on the covenant itself. *McCreery v. Day.* 1

—When contractor, upon receiving final payment under his contract, executes release of all causes of action, damages, etc., this is a good defense to any claim for damages ensuing under the contract.

Phelan v. Mayor, etc.

86

DEFINITION.

1. An heir who takes by descent is not a "purchaser" within the provision of the Revised Statutes (1 R. S. 738, § 137), which declares that an unacknowledged and unattested deed "shall not take effect as against a purchaser or incumbrancer until so acknowledged;" and does not hold the estate descended by purchaser. *Strough v. Wilder.* 530

2. The word "purchaser" in said statute, means one who derives title by purchase from the grantor in the unacknowledged and unattested deed, or from one who, himself, is either mediately or immediately a purchaser from such grantor. *Id.*

DEMAND.

—Where a party seeks to avail himself of a certificate of deposit as an equitable set-off, a previous demand of payment not necessary.

See Richards v. LaTourette. 54

DISCOVERY AND INSPECTION.

The granting or withholding of an order of discovery, is a matter within the discretion of the Supreme Court, and its decision, based upon the merits of the application, is not reviewable here. *Finlay v. Chapman.* 404

DIVORCE.

1. In an action for divorce, brought by the wife, a motion for a temporary allowance and counsel fee was denied by the Special Term, on the ground that final judgment had been rendered for plaintiff, awarding her alimony and costs, and that, although the defendant had appealed therefrom and procured a stay, and the wife had no means of support or for defending the appeal, yet the court was without power to grant the relief desired. This order was reversed by the General Term, and the case remitted to the Special Term for a decision on the merits. *Held*, that the order of the General Term was not final, and so was not appealable to this court. *McBride v. McBride.* 519
2. *It seems*, that power exists in such a case to make the allowance sought during the pendency of the appeal from the judgment and until the final determination of the action. (Code Civ. Pro. § 1769.) *Id.*

3. *It seems*, also, that the court below, in the exercise of its discretion, may and should require, as a condition of the allowance, that plaintiff stipulate that the sums allowed shall, in case of an affirmance of the judgment, be applied by her as payment *pro tanto* thereon. *Id.*

DOWER.

1. B., by his will, gave to his widow, in lieu of dower, one-third of his personalty absolutely, and the net income for life of one-third of his real estate, which was vested in a trustee for that purpose. About three years after B. died, the widow brought an action in which she asked that she might be permitted to make her election, renounce the testamentary provision, and have her dower assigned, on the ground that she was ignorant of the extent of her husband's estate until the executor filed his accounts, and was induced to omit to take the steps necessary to claim dower by representations of the executor made in the presence of S., the principal beneficiary under the will, and by S., as to the value of her dower right. *Held*, that plaintiff was not entitled to the relief sought. *Akin v. Kellogg.* 441
2. The provision of the statute (1 R. S. 741, §§ 13, 14) requiring a widow to elect within one year between a provision made for her in her husband's will and the right to have her dower in his real estate admeasured, and declaring that she shall be deemed to have elected to take the testamentary provision, unless within that time she shall enter upon the lands to be assigned to her for dower, or commence proceedings for the assignment thereof, has the force of a statute of limitations, and she is at once, on the death of the testator, charged with the duty of informing herself, so as to make her election. *Id.*
3. It appeared that the lands in which plaintiff claimed dower, had been conveyed by the testator to S. for a nominal consideration four years before his death, much

of which time he had lived upon them with plaintiff; that five days after his death the deed was recorded. Plaintiff's evidence was to the effect that S. said to plaintiff, the day after the funeral that she "would receive much more than if she had received her dower," and shortly afterward that there would be "money enough for us all," and that the executor stated in the presence of S. that plaintiff would receive \$1,200 to \$1,300 per annum. *Held*, that these had not the weight of representations of facts upon which an estoppel could be based; but were mere expressions of opinion, and so could not exempt plaintiff from the duty of examining herself into the condition of affairs. *Id.*

ELECTION (OF OFFICERS).

1. Inspectors of election are simply ministerial officers, and a board of inspectors has no discretionary power to reject the vote of a person who, upon being challenged and upon application of the statutory tests, has shown himself qualified to vote. When this is done the offered vote in legal contemplation is finally received, and must be deposited. *People ex rel. v. Bell.* 175
2. *It seems* the lawfulness of a vote cannot be determined until it has been received, and an elector's right cannot be annulled without a trial. *Id.*
3. In proceedings by mandamus to compel defendants, who were members of a board of inspectors of election, to affix their signature to the election returns, it appeared that after the closing of the polls the inspectors counted the ballots cast and declared the result, but defendants refused to affix their signatures upon the ground that fraudulent votes were cast by persons who were not themselves registered, but who falsely personating registered voters, upon being challenged, complied with statutory tests. *Held*, that it was the duty of the inspectors to count and return all

the votes cast, and of each to attach his signature to the return; and that a peremptory writ was properly granted. *Id.*

4. The affidavits presented in opposition to the motion for the writ averred that the fraudulent votes when offered were objected to on the ground that "the persons were challenged and sworn and their answers were unsatisfactory." It was not denied, however, that the challenged voters complied with the statutory requirements. *Held*, that the said averment fell short of an allegation that full answers were not made, but meant simply that while full answers were made they did not satisfy the defendants; and that this did not warrant them, either in denying the rights of the voters or in refusing to sign the returns. *Id.*

5. The opposing affidavits alleged that the questioned "ballots were not received by the board or by a majority thereof." *Held*, that it was not essential that the reception of the ballot of a challenged voter should be agreed to by a majority of the board; that within the meaning of the provisions of the General Election Law (Art. 4, tit. 3, § 28, chap. 130, Laws of 1842), which directs that "when the board shall finally have received the ballot of an elector one of the inspectors * * * shall deposit it," the ballot is finally received when the elector has satisfied all the statutory tests, and any inspector may deposit it. *Id.*

ELECTION (OF REMEDIES).

Where one bank has funds on deposit with another, the law implies a contract between them that the latter shall pay the amount standing to the credit of the former, upon and according to its drafts or order, and a failure so to pay is a breach of contract, for which the debtor bank is legally liable; the remedy of the depositor is not confined to a suit for the whole deposit. *C. N. Bank. v. I. & T. N. Bank.* 195

EMINENT DOMAIN.

1. Under the provision of the General Railroad Act of 1850 (§ 18, chap. 140, Laws of 1850), which authorizes a corporation organized under it to obtain, by condemnation, such lands as is "required for the purposes of its incorporation," only such and so much land may be condemned as the proper execution of the corporate purposes shall require and render necessary. *In re S. B. R. R. Co.* 141
2. Under the provision of the Street Railroad Act of 1884 (§ 3, chap. 252, Laws of 1884), giving to a corporation organized under it the right to construct its road "through, along and upon any private property which said company may require for the purpose," and giving it the powers and privileges granted to corporations organized under the General Railroad Act, conceding that a street railroad corporation has power to condemn lands of a private owner in some cases and for some purposes, as to which *quære*, the purposes are those, and those only, which the law of its organization describes and defines, and which are certified to in its articles of association; those purposes are limited to the construction of a street surface railroad. *Id.*
3. Where, therefore, the articles of association of a corporation organized under the Street Railroad Act, stated its purpose to be to construct and operate a street surface railroad through certain specified avenues in the village of E., and the corporation subsequently filed a map of its intended route, which was not along the specified streets, but was located upon private property outside of the streets for nearly the whole distance, *held*, the corporation had no right to condemn the lands upon which the proposed route was located, as they were not required for the purposes of its incorporation; that while a right to change the specified route might exist, this did not authorize a change which involved not only a contradiction and violation of the articles of association,

but also of the character and quality of the corporation. *Id.*

ERIE (COUNTY OF).

1. Under and by the provision of the act of 1881 (Chap. 557, Laws of 1881), declaring that every county treasurer thereafter elected or appointed in the county of Erie, "shall receive, as compensation for his services," an annual salary to be fixed before he enters upon the duties of his office, the six months' limitation of the act of 1877 (Chap. 436, Laws of 1877) became inapplicable, and it became lawful for the board of supervisors to fix the next treasurer's salary at any time before his election, and the salary, so fixed, is the only compensation he is entitled to for the entire and complete performance of all his official duties. *Supra. Erie Co. v. Jones.* 339
2. Accordingly, *held*, that defendant, who was elected county treasurer at the November election in said county, following the passage of said act of 1881, the board of supervisors having previously fixed his salary, was only entitled to the salary so fixed; and he having withheld the fees collected by him and refused to pay the same over to the county, which, under the act of 1880 (Chap. 233, Laws of 1880) was entitled to them, that an action was maintainable against him, on behalf of the county, by its board of supervisors, to recover the same. *Id.*

ESTOPPEL.

1. A town cannot be estopped by the neglect of its supervisor to assert a claim against the county, the grounds of which are equally known to all members of the board of supervisors. *Strough v. Supra. Jeff. Co.* 212
2. In an action to recover the possession of personal property, when the defendant gives an undertaking for the return of the property, admitting therein that plaintiff has taken the property described in his affidavit and requisition from

defendant's possession, he is estopped from denying that he had possession of the property, or any part thereof, at the commencement of the action, or from showing that it was different or other property; he is concluded by the recitals in the undertaking. *Martin v. Gilbert.* 298

3. The effect of the recital, as an estoppel, is not taken away by the fact that after the return of the property to the defendant, he serves an answer, denying that he ever had possession of the property mentioned in the complaint or affidavit accompanying the requisition; nor is its effect disturbed by the provision of the Code of Civil Procedure (§ 1704), giving defendant a right to a return of the property replevied, on giving a bond, although it be not the property described in the requisition. *Id.*

4. The submission to arbitration, by parties, of all matters in dispute, growing out of a particular transaction or contract, will estop them from thereafter claiming that the award is not conclusive and does not embrace a decision upon some particular matters. *N. Y. L. & W. W. Co. v. Schneider et al.* 475

5. After the writ of certiorari was issued, the assessment-roll having been placed in the hands of the proper officer for collection, the relators paid the taxes imposed upon the property, leaving, however, with the officer a writing, stating that the taxes were paid under protest, for the reason that the assessment was excessive and that for the correction thereof, proceedings were then pending. *Held*, that in the absence of any evidence as to the circumstances under which the payment was made, the presumption was, that the payment was involuntary, and so, did not estop the relators. *People ex rel. v. Carter.* 557

6. *It seems*, where one pays, under protest, taxes based upon an assessment, not void, but simply excessive, and gives notice of his intention to review and correct the same in proceedings then

pending for that purpose, and that he intends to reserve, not to waive or abandon, his proceedings, such a payment may not be set up as a bar to the further prosecution of the proceedings. *Id.*

—*Expressions of opinion as to value have not the weight of representations of fact upon which estoppel can be based.*

See Akin v. Kellogg.

441

EVIDENCE.

1. In considering the extent of the rights of the respective parties in the grant of a right of way, it is not proper to refer to the parol negotiations which preceded or accompanied its execution, but the language of the grant should be regarded, and when that is uncertain or ambiguous, the circumstances surrounding it, and the situation of the parties, with a view of arriving at the true intent of the parties. *Herman v. Roberts.* 37

2. In an action to recover possession of personal property, as plaintiff's affidavit, requisition and the return of the officer are made by the Code of Civil Procedure (§ 1717) part of the judgment-roll and a copy of them is required to be furnished to the court or referee on trial, it is not necessary to put them formally in evidence in order that the court may consider them. *Martin v. Gilbert.* 298

3. Upon trial of an action to recover for the alleged unlawful conversion of a quantity of oil placed in defendant's possession for storage by W. and M. and which defendant, upon demand and after notice of plaintiff's claim, refused to deliver, plaintiff, to establish his title, introduced in evidence a judgment-roll in an action brought by W. and M. against him, in which the title to the oil was in issue, and it was decided that plaintiff here was owner. The referee held that said judgment conclusively established plaintiff's right to the oil, and excluded evidence offered by the defendant to dispute said right. *Held*, no error. *Hughes v. U. P. Lines.* 423

4. Where, on trial of an action to set aside a conveyance of real estate made by an insolvent debtor, as executed to hinder, delay and defraud creditors, the court excluded evidence offered by plaintiff to the effect that prior to the conveyance, bankruptcy proceedings had been commenced against the grantor and an order issued therein restraining him from making any distribution of the property, *held*, no error. *Talcott v. Harder*. 536
5. In an action brought to recover alleged damages caused by the unlawful construction and maintenance of defendant's railroad in front of plaintiff's premises, the question litigated was as to plaintiff's title and possession. Plaintiff was allowed to give in evidence, under objection and exception, a deed of the premises executed to him after the commencement of the action. *Held*, error. *Dean v. M. E. R. Co.* . 540
6. Upon the trial of an indictment for murder, evidence was admitted as to quarrels between defendant and deceased, and as to conversations between them. *Held*, proper, as tending to show the existence of motive. *People v. Kemmler*. 580
7. Physicians who had been sent to the jail by the district attorney to make an examination of the prisoner were permitted to testify, as witnesses for the prosecution, to his mental condition, under the objection that either the relation of patient and physician existed, or else the prisoner was compelled to furnish evidence against himself. *Held*, no error; no evidence having been called for as to the prisoner's statements or as to transactions in the jail. *Id.*
8. The rule which rejects parol evidence when offered with respect to written contracts, has no application to a case where, of an original agreement which has been executed, a part only is in writing and the remainder is verbal. *Routledge v. Worthington Co.* 592
9. The written memorandum of a contract required by the Statute of Frauds must contain, within itself or by reference to other writings, all the essential elements of a contract, and when it comes up to these requirements, neither party will be permitted to show that the contract was other or different than that stated. *Id.*
10. If, however, the writing is insufficient, but there has been such a performance as to take the case out of the operation of the statute, oral evidence is admissible to supply omissions and to establish what were the contractual relations of the parties. *Id.*
11. In an action to recover for certain publications sold by plaintiffs to defendant, plaintiffs produced in evidence an agreement signed by defendant by which it agreed to take the publications at a price specified, amounting to \$4,000. It appeared that after the parties had come to an agreement in regard to the sale, defendant at plaintiffs' request for a formal order executed the writing. Defendant set up as a counterclaim, and offered to prove by oral evidence that plaintiffs agreed in consideration of the purchase, and as part of the agreement, that the trade-price at which they sold the publication should not be lowered, and claimed damages for a breach of that agreement. The testimony was rejected. *Held*, error; that the writing represented a part only of the contract, that is defendant's undertaking, while that of plaintiffs rested simply in parol; that there was in fact no valid contract between the parties; but as it had been executed, this took the agreement out of the Statute of Frauds, and left the parties subject to and bound by the terms of the actual agreement made. *Id.*
12. On trial of an action to set aside an instrument on the ground of conspiracy and fraud, in the absence of any proof connecting a person not a party to the action with the alleged conspiracy, his acts or declarations are immaterial and inadmissible; to make them competent, *prima facie* evidence must first be given of the existence of the conspiracy, and of the con-

nection of the person whose acts and declarations are sought to be proved. *Rutherford v. Schattman*.

604

13. Where the proof establishing the existence of a valid claim against an estate was clear and uncontradicted, *held*, the exclusion of evidence that in a conversation between the executor and the holder of the claim in reference to a claim of the estate against him, nothing was said by him as to his claim, was not error justifying a reversal. *Cohu v. Husson*,

609

14. Where the probate of a will was contested upon the ground that the instrument was fabricated after the death of the testator by O., one of the witnesses thereto, and the proof on the part of the contestants consisted mainly of acts and declarations of O., who had died prior to the trial, tending to show that the testator died intestate, and that O. fabricated the instrument, *held*, it was competent to prove declarations of O., during the life of the testator, to the effect that he had made a will. *In re Hesdra*.

615

15. *It seems* that declarations of a deceased subscribing witness to a will are competent to impeach its execution so far as his signature thereto is concerned; they have no other effect however than to impair the force of his signature as evidence of the performance of the conditions stated in the attesting clause. *Id.*

16. Upon the trial of an action to recover for services of plaintiff under a contract between him and V. T., defendant's testator, a book was offered in evidence, on the part of the plaintiff, which contained an account of work done for V. T. and others. There was oral testimony showing that it was correctly kept and had been recognized by V. T. in his settlements with other persons as accurate. The evidence was received under objection and exception. *Held*, no error. *West v. Van Tuyl*.

620

— *Where objection on trial insufficient to raise question as to competency of evidence.*

See Haughurst v. Ritch (Mem.), 621.

EXCEPTIONS.

1. Where a reversal of a judgment by the General Term is upon the law, not the facts, to sustain the reversal here, it must appear that some exception was taken on the trial raising a question of law, and that such question was erroneously decided. *Schoonmaker v. Bonnie*.

565

2. A judgment will not be reversed as to one of several parties appellant, although to him erroneous in law, upon a general exception by all, in the absence of a special exception pointing out the error in the particular case. *Id.*

3. An exception to a finding of fact does not reach an erroneous reason given for it in an opinion of the court accompanying its decision; if there is in any view evidence to sustain it, this court is bound by it. *Rutherford v. Schattman*.

604

4. In the absence of an exception to a finding of fact by a referee, or of a request to find differently, the finding is not reviewable here. *West v. Van Tuyl*.

620

EXECUTION.

1. Certain creditors of a corporation, whose claims against it were valid and past due, and against which there was no defense, knowing the corporation to be insolvent, and for the purpose of obtaining a preference over other creditors, commenced action against it, the summons being served upon D., one of the directors, under an arrangement with him that he would not disclose the service to the other officers; he carried out the agreement and suffered said creditors to obtain judgment by default. The corporation had no real estate and its personal property was

- levied upon and sold under execution issued on said judgments. In an action brought by a receiver of the corporation, appointed subsequent to the levy, to have the judgments declared void and set aside, *held*, that the arrangement did not constitute an assignment or transfer; that there was no violation of said statute, and that the action was not maintainable. The claim was made upon the part of the plaintiff on appeal that the sale under the execution after the appointment of the receiver was absolutely void. *Held*, untenable, as no such cause of action was set forth in the complaint, and there was no finding in reference thereto by the trial court. *Varnum v. Hart*. 101
2. Also *held*, that as the sheriff had seized upon the property and had it in his possession at the time of the appointment of the receiver the sale was not absolutely void, but at most could be held to be simply irregular. *Id.*
3. Another creditor commenced his action by service of summons on the president of the corporation. At a meeting of its directors held the next day, a resolution was passed authorizing an attorney to appear for it and offer judgment for the amount of the claim; this the attorney did, and, four days after the service, judgment was entered on the offer, and execution entered thereon. It was then arranged between said creditor and the other judgment-creditors, three in number, whose executions had been levied, that the sheriff should sell by virtue of all the executions and apply the proceeds *pro rata* thereon. The proceeds of sale were not sufficient to satisfy the three executions first levied. *Held*, that assuming the last judgment was in violation of the statute, and so void, as to which *quære*, this did not invalidate the sale; that as the valid executions had the prior lien and this was more than the proceeds, they justified and upheld the sale, and the presence of the other execution in the hands of the sheriff, which even if valid, was not entitled to any of the proceeds, could work no harm. *Id.*
4. Under the provision of the Code of Civil Procedure (§ 1393) exempting pensions granted by the United States or a state for military or naval services from levy and sale on execution, where the receipts from a pension can be directly traced to the purchase of property necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt. *Y. C. N. Bank v. Carpenter*. 550
5. Where, therefore, a pensioner who had a wife and family purchased a house and lot for a home, paying a portion of the purchase-price out of the proceeds of a pension certificate, and giving a mortgage on the premises to secure the balance, *held*, that the premises were exempt from levy and sale on execution. *Id.*
6. *It seems* that where pension moneys have been embarked in business and mingled with other funds so as to be incapable of identification or separation, the pensioner loses the benefit of the exemption. *Id.*

EXECUTORS AND ADMINISTRATORS.

1. To the extent that a surrogate is given jurisdiction in the administration of the estates of deceased persons, he acts judicially; and while his judicial acts are controlled by the limitations imposed by statute, where in a matter within his peculiar jurisdiction it is claimed that he is divested of all discretion, to justify that conclusion the language of the statute must be incapable of any other interpretation. *In re Wagner*. 28
3. The provisions of the Code of Civil Procedure (§§ 2715, 2726, 2727), authorizing a "person interested in the estate" to apply to the surrogate for an order to compel an executor to file an inventory or to account, and requiring he surrogate, in case he is satisfied that the executor is in default in filing a sufficient inventory, to make an order requiring him so to do, or in case he fails "to show good cause to the contrary"

to require him to account, and the provision (§ 2514, sub. 11) that where a person interested applies, "an allegation of his interest duly verified suffices, although his interest is disputed," do not make it compulsory upon the surrogate to grant the petition, simply because the petitioner swears that he is interested. *Id.*

3. The said provisions do not deprive the surrogate of the discretion and power to pass upon the right of the petitioner to demand the relief sought, and the executor may show, in opposition to the application, that the estate has been settled, and that all the beneficiaries named in the will have received their share and released the executor from all claims; and this being shown, it is the duty of the surrogate to deny the application. *Id.*

4. As to the filing of an inventory, the executor is not in the eye of the law "in default" or "a delinquent," and as to the accounting, he does not fail "to show good cause to the contrary" when it appears that the estate has been accounted for and distributed among those entitled thereto; and this, although the accounting and distribution were made out of court. *Id.*

5. *It seems*, where it appears in answer to such an application, that the right of the petitioner has been satisfied and extinguished or barred by a release, and the *factum* of the settlement or release is put in issue by his reply, or it is questioned on the ground of fraud, the surrogate has no jurisdiction to try the issue, and should dismiss the petition, remitting the applicant to his proceeding in a court having general equity powers to try it. *Id.*

6. Where all the parties interested in an intestate's estate are of full age, and one of them, with the assent of the others, undertakes to administer upon the estate without the issuing of letters of administration, settles all claims against the estate, states an account and distributes the balance

so shown to be on hand for distribution, and each of the other parties interested takes his or her share, the settlement is, so far as it goes, binding, and no one of them can thereafter claim, through a formal administration, a new distribution; and this is so, in the absence of any claim of fraud or mistake, although it appears that the party making the distribution credited himself in the account with the amount of an indebtedness of the intestate to him, which was not questioned by the others. *Ledyard v. Bull.* 62

7. *It seems*, however, where the party making the distribution is legally chargeable with interest on any item of the account, and the same is not included in the account, the settlement and acceptance of their distributive share does not, in the absence of a release, bar the other next of kin from claiming and recovering a proportionate share of the interest. *Id.*

8. *It seems*, while as a general rule an administrator may not retain from money in his hands the amount of a debt due him from the intestate, until it has been legally established and allowed, he may do so if all the persons interested in the estate assent thereto. *Id.*

9. It appeared, in such a case, that the item upon which interest was claimed, was an item in a running account representing the intestate's share in a business not then closed; that the amount was not definitely determined at the time of the entry, but was entered subject to modification upon a subsequent collection of the assets and closing up of the business; and that the decedent's share was left in the hands of his son, the party who made the distribution, as a deposit, he drawing upon it from time to time during his life as he required money. *Held*, that the item did not draw interest until demand, and in the absence of proof of a demand, interest was not chargeable; also that, conceding the rule to be otherwise, the facts justified an inference that it was the understanding of the par-

- ties that no interest should be charged. *Id.*
10. In the absence of creditors, an administrator is a mere trustee for the next of kin, charged with the sole duty to collect, convert and distribute the estate. *Id.*
11. Where, therefore, the whole estate has been legally and justly distributed, there is no trust duty to be performed and no need of a trustee. *Id.*
12. In proceedings under the provisions of the Code of Civil Procedure (§ 2606), giving the surrogate jurisdiction upon the death of an executor to require his executor or administrator to account for and deliver over the trust estate, such representative stands in place of the decedent for the purpose of the accounting, and the surrogate's power is precisely the same as if the letters of the deceased executor had been revoked in his lifetime, and he had been called upon to deliver up the assets. *In re Clark* 427
13. In such a proceeding, the referee to whom the matter was referred by the surrogate found as facts that a large amount of money belonging to the estate was received by C., the deceased executor, beyond the sums acknowledged in the account presented by his executrix, specifying various items, including one of \$15,000 received by C. within three months of his death, and "deposited by him in his own private bank account," and that "there was no evidence of the disposition of said funds" by him, with certain specified exceptions; also, that the accounting executrix, although in possession of C.'s bank and check-books, refused to produce them. As conclusions of law, the referee found that there being no evidence of the disposition of said funds by C., they are presumed to have come into the possession of his executrix; and that said presumption was strengthened by the deposit by C. to his private account, and the refusal of his executrix to produce such book, and that a decree should be entered against her individually and as executrix for the sums due. Upon the hearing before the surrogate he modified the finding that the moneys received by C. were deposited by him in his own private account, by substituting a finding that the moneys were deposited to his own individual credit, and he sustained exceptions to the conclusions of law, so found, as to the presumption that the fund came into the possession of the executrix, and to the direction of judgment against her individually, and he awarded judgment against her as executrix simply; the report in all other respects was confirmed. The General Term affirmed the decree on the ground mainly that there was no finding by the referee that the fund belonging to the estate received by C. passed into the hands of his executrix. *Held*, error; that the finding as to the presumptions were of fact, not of law, and amounted to a finding that the fund which C. received passed on his death into the actual possession of the executrix; and that the conclusion as to her individual liability followed as a conclusion of law. *Id.*
14. Where the proof establishing the existence of a valid claim against an estate was clear and uncontradicted, *held*, the exclusion of evidence that in a conversation between the executor and the holder of the claim in reference to a claim of the estate against him, nothing was said by him as to his claim, was not error justifying a reversal. *Cohn v. Husson.* 609
15. The allowance of costs, upon a reference under the statute of a disputed claim against an estate, is within the discretion of the court below, and is not reviewable here. *Hauxhurst v. Ritch.* 621
16. Under the provisions of the Code of Civil Procedure (§ 2606), conferring upon the Surrogate's Court jurisdiction on death of a guardian, executor or administrator, to require his executor or administrator to account for and deliver over the trust estate the same as it would have against the decedent, if his letters had been

revoked in his life-time, his representative, as soon as appointed, stands in his place for the purpose of such accounting and delivery, and the application therefor may be made immediately upon such appointment. *In re Wiley.* 642

EXPERTS.

It seems, expert evidence is entitled to consideration only when fairly given by one properly qualified to give it by experiment, study and scientific eminence and upon a hypothesis which is true in the relation of its parts to the whole case which is the subject of the inquiry. *People v. Kemmler.* 580

FACTORS.

The provisions of the "Factors Act" (Chap. 179, Laws of 1830), declaring that every factor or other agent intrusted with the possession of merchandise or the documentary evidence of title thereto "for the purpose of sale * * * shall be deemed to be the true owner, so far as to give validity to any contract made by such agent with any other person for the sale or disposition * * * of such merchandise," has no application when a factor or agent has obtained goods taken by a common-law larceny from the true owner. *Soltau v. Gerdau.* 380

FERRIES.

Plaintiff was assignee of two leases, executed by defendant, of ferries between New York city and Staten Island; it also owned a railroad which it operated in connection with said ferries. The lessees were bound simply to run their boats to the island; they being free to choose their port of arrival and departure; they agreed to pay defendant certain percentages upon the gross receipts annually. One of the leases fixed the minimum rate of ferriage at five cents per person, the other fixed no minimum rate. Plaintiff selected St. George as the port, and charged for each passenger stopping there

ten cents and the same price for passengers taking the railroad to other places, of which it allowed five cents for ferriage. The city had knowledge of this, its commissioner of accounts having investigated plaintiff's books of receipts, ascertained the division made, assented to the basis adopted and thereafter accepted the percentages founded upon that division. In an action to restrain the city from declaring the leases forfeited because of plaintiff's refusal to pay the percentage upon its entire gross receipts, *held*, that plaintiff was entitled to the relief sought; that the fact that one sum was paid for passage over the ferry and railroad did not make the whole ferry receipts, and plaintiff was not bound to pay the city anything on account of its railroad fares; that the reduction of ferriage to passengers taking the railroad was not violative of the leases; that if plaintiff has made a wrong discrimination among its passengers it is a public wrong and not one to the city as lessor; and that the only question was what have been in truth and in fact the actual ferry receipts, not what they ought to, or might have been. *S. I. R. T. R. R. Co. v. Mayor, etc.* 96

FINDINGS OF LAW AND FACT.

1. Although a referee, in his report, places a finding of fact among his conclusions of law, this does not deprive it of its force. *In re Clark.* 427
2. In a proceeding under the Code of Civil Procedure (§ 2606) to compel the executor of a deceased executor to account for and pay over the trust estate, the referee to whom the matter was referred by the surrogate found as facts that a large amount of money belonging to the estate was received by C., the deceased executor, beyond the sums acknowledged in the account presented by his executrix, specifying various items, including one of \$15,000 received by C. within three months of his death, and "deposited by him in his own private bank account," and that "there was no evidence

of the disposition of said funds," by him, with certain specified exceptions; also, that the accounting executrix, although in possession of C.'s bank and check-books, refused to produce them. As conclusions of law, the referee found that there being no evidence of the disposition of said funds by C., they are presumed to have come into the possession of his executrix; and that said presumption was strengthened by the deposit by C. to his private account, and the refusal of his executrix to produce such book, and that a decree should be entered against her individually and as executrix for the sums due. Upon the hearing before the surrogate he modified the finding that the moneys received by C. were deposited by him in his own private account, by substituting a finding that the moneys were deposited to his own individual credit, and he sustained exceptions to the conclusions of law, so found, as to the presumption that the fund came into the possession of the executrix, and to the direction of judgment against her individually, and he awarded judgment against her as executrix simply; the report in all other respects was confirmed. The General Term affirmed the decree on the ground mainly that there was no finding by the referee that the fund belonging to the estate received by C. passed into the hands of his executrix. *Held*, error; that the finding as to the presumptions were of fact, not of law, and amounted to a finding that the fund which C. received passed on his death into the actual possession of the executrix; and that the conclusion as to her individual liability followed as a conclusion of law. *Id.*

3. In the absence of an exception to a finding of fact by a referee, or of a request to find differently, the finding is not reviewable here. *West v. Van Tuyl.* 620

FISH AND FISHERIES.

1. The legislature has power to regulate and control the right of fishing in the public waters of the

state, and in the exercise of this power may prohibit the taking of fish with nets in specified waters, and by its declaration, make the setting of nets for that purpose a public nuisance. *Lawton v. Steele.* 226

2. The provision of the act of 1883 (§ 2, Laws of 1883, chap. 317), declaring "any net found * * * in or upon any of the waters of this state, or upon the shores or islands in any waters in this state, in violation of any existing or hereafter enacted statutes or laws for the protection of fish," to be a nuisance, authorizing its summary abatement and destruction by any person, and making it the duty of every fish protector and constable "to seize and remove and forthwith destroy the same," so far as it authorizes the destruction, by a fish protector or constable, of nets found in actual use in the waters of the state, is constitutional; its constitutionality is not affected by the authorization also given to private individuals and officers to destroy nets on land. *Id.*
3. Black River bay is part of Lake Ontario, within the meaning of the act of 1886 (Chap. 141, Laws of 1886), prohibiting the killing or taking of fish by nets in certain portions of said lake. *Id.*

FORECLOSURE.

1. The judgment in an action to foreclose a mortgage executed by a telegraph company to secure its bonds, recited the amount due upon the bonds as it appeared by affidavit, ordered the referee appointed to sell to ascertain and report the amount due "on such bonds as may be ascertained and reported by such referee to be secured by said mortgage," with the names of the persons holding them and by what title, and to sell, unless previous to the sale "the amount herein found as actually due and payable" shall be paid. The referee did not, prior to the sale, report the amount due; his report of sale was confirmed. On motion by a bondholder to set aside the sale, upon the ground

that the failure to make such report rendered the sale illegal, *held*, that the court below was competent to interpret its own judgment, and its confirmation of the sale showed its understanding to be that the reference as to amount of bonds was to be executed after sale. Also *held*, that, inasmuch as it appeared that the entire proceeds of the foreclosure would be exhausted in paying claims paramount to the bonds, the omission to execute the reference before sale, conceding it was required by the judgment, was at most a harmless irregularity; and that the court below had power, in its discretion, to refuse to set aside the sale on that account. The judgment did not expressly authorize the referee to execute a deed to the purchaser; it provided that the purchaser should be entitled to possession on production of his deed, and that the mortgagor and its receiver should join in the deed. It was claimed that the referee had no authority, under the judgment, to execute a deed. *Held*, untenable; that such authority was to be understood from the language of the judgment; also, that as the court below had sanctioned the giving of the deed and thus construed its judgment, no ground of complaint on that account remained. *F. L. & T. Co. v. B. & M. T. Co.* 15

2. The judgment provided that the purchaser should pay a certain amount of the purchase-price in cash, and that the balance might be paid in receiver's certificates or in bonds, to be received at a *pro rata* rate, as provided. Upon the sale the purchaser paid the cash required and delivered to the referee what was supposed, at the time, to be a sufficient amount of certificates, but which afterwards proved to be insufficient to pay the balance of the purchase-money; he also gave ample security to pay any balance that might be found due. In confirming the referee's report, the court ordered that the referee should inquire and report to the court what receiver's certificates should have been or should be accepted by him in payment of the purchase-price, and

how much, if anything, was due upon the purchase-price. It was claimed the full purchase-price should have been paid before the deed was delivered. *Held*, untenable. *Id.*

3. Prior to the sale a reorganization agreement had been entered into, to which the petitioner was a party. *Held*, that the court was not obliged to set aside the sale because such agreement had been violated; that the court, in its discretion, could leave the petitioner to pursue its remedy by action. *Id.*
4. The petitioner did not offer to bid for the property upon a resale any more than the price for which it was sold, and did not show that anyone would bid any more; also, with knowledge of all the essential facts, it delayed for nearly two years before making the application. In the meantime the property had gone into the hands of a new corporation, which had expended large sums of money thereon, had mortgaged the same to secure bonds, and had issued stock to a large amount; so that if a resale were ordered it would be impossible to restore the parties to be affected thereby to their former position, and irreparable mischief might be done. *Held*, that the petitioner had no absolute legal right to have the sale set aside; that the court below had discretion to deny the application; that it did not appear it had abused its discretion, and, therefore, this court had no jurisdiction to review the order appealed from. *Id.*
5. In an action to foreclose a mortgage held by plaintiffs, as assignees for the benefit of creditors of the mortgagees, defendant M., who had purchased the premises subject to the mortgage, sought to set off a claim against plaintiff's assignors. It appeared that at the time of the assignment to plaintiffs, the debt secured by the mortgage was not due; that the assignors were insolvent and M. endeavored to have his debt, which was due, applied by them upon the mortgage before it was assigned. *Held*, that he was equitably entitled to the set-off; that it

was not necessary that the mortgage debt should have been due, as by seeking to have the debt due him applied thereon, M. treated it as due and so waived any defense he might have based upon the fact that it was not due; that he had a right so to do and to require the set-off. *Richards v. La Tourette*.

54

6. Plaintiff in 1836 joined with her husband in a mortgage upon his land. In 1838 they were both made parties to a suit for the foreclosure of the mortgage. No copy of the writ of subpœna was served upon her; one was served upon the husband, and one delivered to him with the request to hand it to her; she was at the time under age. A judgment of foreclosure and sale was entered, under which the premises were sold. The husband died in 1882. In an action to recover dower, *held*, that under the rule and practice in chancery proceedings in force at the time of the foreclosure, personal service of the writ upon plaintiff was not necessary, but service on the husband was a good service on both, and this was so although she was at the time under age; and that, therefore, the action was not maintainable. *Feitner v. Leicis*.

131

7. In an action to foreclose a second mortgage upon certain lots in the city of New York, the first mortgagee was made a party, and payment of the first mortgage was adjudged to be made out of the proceeds of the sale. Other persons who held subsequent mortgages covering, in whole or in part, said lots, which took effect at different dates, were made parties to the action. The decree of sale provided for a sale of the lots in separate parcels in the inverse order of the giving of the mortgages. A surplus having arisen on sale of all the lots, the court below directed a distribution, according to the priorities as liens of the various subsequent mortgages. *Held*, no error; that the decree did not and could not settle the priorities and equities of the subsequent incumbrances;

that the whole proceeds of sale formed a common fund, to be applied first to the payment of the first and second mortgages, the surplus to the payment of the subsequent liens in the order of their priority, subject to the limitation that no greater amount should be paid in discharge of a lien on any lot than was realized for the lot at the sale; that, therefore, the surplus could not be regarded as constituting a specific fund, subject to the specific liens upon the last lot sold, but as a common fund distributable to all the lienors in the order of the date when their mortgages became liens. *Burchell v. Osborne*.

486

8. In an action brought to foreclose a mortgage upon certain premises given by M., who held an apparently perfect record title to the same, it appeared that before the execution of the mortgage, M. had conveyed the premises to B. who was in possession, and, with her husband, occupied two rooms in the buildings on the premises; he also kept a liquor store in a part thereof; the other rooms she leased to various tenants, claiming to be the owner, and she collected the rents. Her deed was not recorded until after the giving of the mortgage. *Held*, that B.'s actual possession under her deed, although unrecorded, and its existence unknown to the plaintiff, was sufficient notice to him of her rights to defeat any claim under the mortgage. *Phelan v. Brady*.

587

9. Also, *held*, that the fact B. and her husband occupied the store and a living apartment in the building prior to the time she went into possession under her contract of purchase could not aid the plaintiff. *Id.*

10. On an appeal in an action for the foreclosure of a mortgage, an undertaking against waste and for the value of the use and occupation of the mortgaged premises operates as a stay of proceedings, without a covenant to pay a deficiency, and it is optional with the appellant which form of under-

taking he will give. (Code Civ. Pro. § 1331.) *Werner v. Tuck.* 632

—As to what will vitiate sale on foreclosure of chattel mortgage. See *Casserly v. Witherbee.* 522

FORMER ADJUDICATION.

1. A decision denying an application of one party aggrieved, to vacate an assessment for a local improvement in the city of New York, does not validate the whole assessment, or bind or affect other parties aggrieved by it. *In re Rosenbaum.* 24

2. In proceedings to vacate an assessment imposed upon the petitioner's property in 1872, on the ground that a portion of the work was done under a contract entered into without advertisement or opportunity for competition, it appeared that in similar proceedings by another petitioner to vacate an assessment on his property for the same improvement, the assessment was sustained. In the former proceedings there was no proof that the price for the work was excessive or unfair, while in this it appeared that on the same day the contract in question was made, contracts for similar work, as to which competition was permitted, were made at a much less price. At the date of the former decision there was no provision for reducing the assessment without vacating it wholly. *Held*, that the doctrine of *stare decisis* did not make the former decision conclusive in this case. *Id.*

8. Upon trial of an action to recover for the alleged unlawful conversion of a quantity of oil placed in defendant's possession for storage by W. and M., and which defendant, upon demand and after notice of plaintiff's claim, refused to deliver, plaintiff, to establish his title, introduced in evidence a judgment-roll in an action brought by W. and M. against him, in which the title to the oil was in issue, and it was decided that plaintiff here was owner. The

referee held that said judgment conclusively established plaintiff's right to the oil, and excluded evidence offered by the defendant to dispute said right. *Held*, no error. *Hughes v. U. P. Lines.* 423

4. Where, in proceedings under the act of 1880 (Chap. 269, Laws of 1880) to reduce an assessment on real estate for the year 1887, it appeared that in 1885 and 1886, the assessors had assessed the land at the same sum, that in similar proceedings in each of those years, there had been a judicial determination fixing the actual value, and that the prior assessment had been reduced to the sum so fixed. *Held*, that in the absence of evidence of an increase of value or of some change affecting the assessable value, the doctrine of *res adjudicata* applied, and the former adjudications were binding and conclusive. *People ex rel. v. Carter.* 557

FRAUD.

1. Where the maker of negotiable paper shows that it has been obtained from him by fraud, a subsequent transferee, must, before he is entitled to recover thereon, show that he is a *bona fide* purchaser, or that he derived his title from such a purchaser. It is not sufficient to show simply that he purchased before maturity and paid value, he must show that he had no knowledge or notice of the fraud. *Vosburgh v. Diefendorf.* 357

2. In an action upon a promissory note against defendant as maker, it appeared that his signature thereto was procured by fraud. The note was purchased of the payee by R., before maturity, for half its face value. Plaintiff claimed as purchaser from R. Defendant's evidence tended to show that R. purchased with moneys furnished by plaintiff who was present at the time of the transfer and directed R. to purchase. R. testified that he had no knowledge of the fraudulent origin of the paper, or of

any facts constituting a defense. Neither the plaintiff nor the payee were sworn as witnesses. The trial court held that plaintiff, as matter of law, was entitled to recover the amount he paid for the note, but if anything beyond that was claimed, the case was one for the jury. Plaintiff having elected to take a verdict for the amount he paid for the note, a verdict was directed accordingly.

Held, error; that the question as to whether plaintiff was a *bona fide* purchaser was one of fact for the jury; as was also the question as to whether R. purchased for himself or as agent; that if in the latter capacity, although he was not chargeable with notice of the fraud, this would not shield plaintiff from the legal consequences of any notice he himself might have had. *Id.*

3. B., by his will gave to his widow in lieu of dower, one-third of his personalty absolutely, and the net income for life of one-third of his real estate which was vested in a trustee for that purpose. About three years after B. died, the widow brought an action in which she asked that she might be permitted to make her election, renounce the testamentary provision and have her dower assigned, on the ground that she was ignorant of the extent of her husband's estate until the executor filed his accounts, and was induced to omit to take the steps necessary to claim dower by representations of the executor made in the presence of S., the principal beneficiary under the will, and by S. as to the value of her dower right. It appeared that the lands in which plaintiff claimed dower had been conveyed by the testator to S. for a nominal consideration four years before his death, much of which time he had lived upon them with plaintiff; that five days after his death the deed was recorded. Plaintiff's evidence was to the effect that S. said to plaintiff, the day after the funeral that she "would receive much more than if she had received her dower," and shortly afterward that there would be "money enough for us all," and that the

executor stated in the presence of S. that plaintiff would receive \$1,200 to \$1,300 per annum. *Held*, that these had not the weight of representations of facts upon which an estoppel could be based, but were mere expressions of opinion, and so could not exempt plaintiff from the duty of examining herself into the condition of affairs. *Akin v. Kellogg.* 441

4. Expressions of opinions by interested persons cannot, when subsequently shown to have been groundless or false, be regarded as misrepresentations. *Id.*
5. On trial of an action to set aside an instrument on the ground of conspiracy and fraud, in the absence of any proof connecting a person not a party to the action with the alleged conspiracy, his acts or declarations are immaterial and inadmissible; to make them competent, *prima facie* evidence must first be given of the existence of the conspiracy, and of the connection of the person whose acts and declarations are sought to be proved. *Rutherford v. Schattman.* 604

FRAUDULENT CONVEYANCES.

1. *It seems*, the provision of the statute relating to fraudulent transfers and conveyances (2 R. S. 137, § 4), which declares that the question of fraudulent intent arising thereunder shall be deemed a question of fact and not of law, does not interfere with the prerogative of the court to direct a verdict, although the case arises under the statute, provided the fraudulent intent is conclusively established on the face of the instrument of transfer or by the uncontradicted evidence. *Bulger v. Rosa.* 459
2. *It seems*, also, an insolvent firm may not apply the firm assets in payment of the individual debts of the partners, nor can the equity of the firm creditors be defeated by a transfer by one of two copartners, of his interest therein, to the

other; they still, as to firm creditors remain firm assets. *Id.*

8. *It seems*, also, where an individual creditor of one of the members of a firm knowingly takes a transfer of firm property in payment of his individual debt, his act is not merely a violation of an equitable right of a firm creditor, but it constitutes a fraud. *Id.*

4. A firm, although insolvent, has a right, however, to make preferences among its creditors, and one partner may transfer the partnership effects directly to a firm creditor in payment of his debt without the knowledge or consent of his copartner. *Id.*

5. Where S. one of two copartners in a firm which to their knowledge was insolvent, as were also the individual members, assigned and transferred his interest in the partnership assets to B. his copartner, subject to the firm's debts, with the knowledge that the latter intended to transfer them to a firm and individual creditor, which transfer was made in payment of all the creditor's claims, and where in an action of replevin against a sheriff, who had levied upon the property under an execution in favor of a firm judgment creditor, the evidence as to value of the property transferred was conflicting, there being evidence tending to show, and from which the jury would have been authorized to find, that such value was not more than the claim of the transferee against the firm, and, that the object of S. in transferring his interest, was that the property should be used to pay the firm debt, *held*, the fact that the individual debts were named as part of the consideration, was not conclusive evidence of fraud; that the question of fraud in the transfer was one of fact for the jury; and that, therefore, a direction of a verdict for defendant was error. *Id.*

6. The fact that an insolvent debtor, after the commencement of bankruptcy proceedings against him, transferred property, by way of

preference, to a creditor, in violation of the provisions of the Bankrupt Act, is not, under the laws of this state, any evidence of fraud. *Talcott v. Harder.* 536

7. Where, therefore, on trial of an action to set aside a conveyance of real estate made by an insolvent debtor, as executed to hinder, delay and defraud creditors, the court excluded evidence offered by plaintiff to the effect that prior to the conveyance, bankruptcy proceedings had been commenced against the grantor and an order issued therein restraining him from making any distribution of the property, *held*, no error. *Id.*

GRANT.

See DEED.

GUARANTY.

D. B. Miller was the holder of certain mortgage bonds to the amount of \$3,000, issued by a corporation, the payment of which was guaranteed by defendant. Pending negotiations between the bondholders and the railroad company for an adjustment, and to obtain her consent to some arrangement for a surrender of the bonds, defendant executed an instrument which, after reciting the facts and stating defendant's desire "for the surrender and cancellation of said bonds, and the substitution of other securities in the place thereof," contained the following: "In the event that any or all of the matters and things hereinbefore mentioned or referred to shall happen, or in case the said bonds or any guaranty shall be cancelled or destroyed or otherwise disposed of as required by said association hereafter, and in spite of and notwithstanding anything that may happen or be done at the request of said association, or in behalf thereof, my aforesaid guaranty of said bonds and my obligation created and incurred by reason of said guaranty, shall remain in full character and effect, and this is hereby declared to be a continuing

running guaranty for the payment of said sum of \$3,000 and interest (according to the original terms of said original guaranty), attached to, and belonging to, and guaranteeing any and all securities, acts, papers, writings and proceedings of said association in regard to the said D. B. Miller, and of its indebtedness hereafter to be done, continued or made." Subsequently an agreement was made between the association and the bondholders which was executed by said Miller, under and by which the association sold and agreed to convey to a trustee for the bondholders certain real estate, at a price specified, being the amount of the outstanding bonds, "to be paid in the aforementioned bonds," and the mortgage to be cancelled of record. "It being understood (the agreement states) that there is nothing due thereon when said bonds shall be surrendered." Upon a sale of the real estate a less sum was realized than the amount of all the bonds. In an action to recover the balance, after application of their proportionate share in reduction of the amount represented by the bonds in question, *held*, that the instrument was simply one of guaranty, defendant obligating himself that the association would pay the indebtedness, evidenced by the bonds previously guaranteed by him, in whatever shape it might assume, and whatever might be accepted as a representative of the indebtedness in lieu of the bonds; and that, therefore, when the bonds were paid in full by the purchase and conveyance of the real estate, and the indebtedness thus cancelled, all liability upon the guaranty ceased, and so, the action was not maintainable. *Miller v. Rinchart*. 368

HABEAS CORPUS.

Upon a return to a writ of habeas corpus where it is shown that the relator has been sentenced and is detained under the process of a court of competent jurisdiction, it is the duty of the court to remand him unless it be shown that the trial court was without juris-

diction to pass the sentence. *People ex rel v. Durston*. 569

HEIRS.

See LEGATEES, NEXT OF KIN, HEIRS, AND DEVISEES.

HUSBAND AND WIFE.

Prior to the passage of the act of 1887 (Chap. 537, Laws of 1887), a deed of lands from husband to wife, or from wife to husband, was void, and did not operate to divest the grantor of title unless founded upon valuable or meritorious consideration such as would enable a court of equity to sustain it. *Dean v. M. E. R. Co.* 540

See MARRIED WOMEN.

INJUNCTION.

1. In a proceeding by reference to ascertain the damages sustained by a party in consequence of an injunction restraining him from exercising some legal right, it is proper to allow as part of the damages the expenses incurred upon the reference. *Holcomb v. Rice*. 598
2. In proceedings to assess damages upon an undertaking given by plaintiff, in an action to set aside a bond and mortgage, in accordance with the condition of an order granting a temporary injunction to restrain a foreclosure, it appeared that there remained, after paying the costs of the foreclosure, the costs of the action and the deficiency upon the sale, in accordance with the terms of the undertaking, a margin sufficient to cover the damages allowed upon confirmation of the referee's report. The sureties bid in the property on the foreclosure sale and sought to include as a payment on account of the undertaking, the amount of their bid; this was disallowed. *Held*, no error; that the purchase of the premises by the sureties to protect themselves did not affect the question of the damages assessable against them. *Id.*

— *When grantee of private way entitled to injunction restraining grantor from interfering therewith. See Herman v. Roberts.* 37

INSOLVENT CORPORATIONS.

1. A receiver of an insolvent corporation unites in himself, not only the rights of the corporation, but those of creditors; he may, in the interest of creditors, assert a claim which he might be unable to do, as a representative solely of the corporation, and he may disaffirm dealings of the corporation in fraud of the creditors' rights. *P. C. Co. v. McMillin.* 46
2. The provision of the Revised Statutes (1 R. S. 603, § 4) prohibiting an insolvent corporation or any of its officers from assigning or disposing of its property for the payment of a debt, and prohibiting any assignment or transfer in contemplation of insolvency, does not impose upon the officers of an insolvent corporation the duty to take measures to procure a disposition of its property without preferences among all its creditors. *Varnum v. Hart.* 101
3. While the purpose of the provision was to prevent unjust discrimination, this was sought to be accomplished not by securing affirmative action, but by restraint upon the action of the corporation and its officers, leaving the property to be taken and disposed of by due course of law, and the corporation may, like an insolvent person, permit the creditors to take hostile proceedings and allow those to obtain a preference who are most vigilant; this does not constitute an assignment or transfer on its part. *Id.*
4. An insolvent corporation is not obliged to defend any suit brought against it for a valid debt, against which there is no valid legal defense, for the sole purpose of defeating a preference; it may suffer default and thus allow a preference. *Id.*
5. Certain creditors of a corporation, whose claims against it were valid and past due, and against which there was no defense, knowing the corporation to be insolvent, and for the purpose of obtaining a preference over other creditors, commenced an action against it, the summons being served upon D., one of its directors, under an arrangement with him that he would not disclose the service to the other officers; he carried out the agreement and suffered said creditors to obtain a judgment by default. The corporation had no real estate and its personal property was levied upon and sold under execution issued on said judgments. In an action brought by a receiver of the corporation, appointed subsequent to the levy, to have the judgments declared void and set aside, *held*, that the arrangement did not constitute an assignment or transfer; that there was no violation of said statute; and that the action was not maintainable. *Id.*
6. The claim was made upon the part of plaintiff on appeal that the sale under the execution after the appointment of the receiver was absolutely void. *Held*, untenable; as no such cause of action was set forth in the complaint, and there was no finding in reference thereto by the trial court. *Id.*
7. Also *held*, that as the sheriff had seized upon the property and had it in his possession at the time of the appointment of the receiver the sale was not absolutely void, but at most could be held to be simply irregular. *Id.*
8. Another creditor commenced his action by service of summons on the president of the corporation. At a meeting of its directors held the next day, a resolution was passed authorizing an attorney to appear for it and offer judgment for the amount of the claim; this the attorney did, and, four days after the service, judgment was entered on the offer, and execution issued thereon. It was then arranged between said creditor and the other judgment creditors, three in number, whose executions had been levied, that the sheriff should

sell by virtue of all the executions and apply the proceeds *pro rata* thereon. The proceeds of sale were not sufficient to satisfy the three executions first levied. *Held*, that assuming the last judgment was in violation of the statute and so void, as to which *quære*, this did not invalidate the sale; that as the valid executions had the prior lien and this was more than the proceeds, they justified and upheld the sale, and the presence of the other execution in the hands of the sheriff, which even if valid, was not entitled to any of the proceeds, could work no harm. *Id.*

INSURANCE (LIFE).

1. In an action upon a policy of insurance on the life of W., non-payment of premium, due October 25, 1884, was pleaded as a defense. The policy contained a clause declaring that the agents of the company "have no power to waive or postpone payment of premium, or to accept payment after it becomes due." It appeared that on July 1, 1884, W. wrote to defendant as to how large a paid-up policy it would give him. Defendant answered stating the then present value of the policy, and what it would be in October, adding that G., its general agent, "will give you further information, or you can write here." The day the premium became due a son of W. called on G. and told him his father had concluded to take a paid-up policy, and then, supposing that a payment of the premium was a necessary step, offered to G. the amount in cash. G. said that payment of the premium was not necessary to entitle W. to a paid-up policy, but advised the continuance of the existing policy, and suggested the witness should talk the matter over with his father and let him decide, adding that he could come in and pay the premium at any time within a week or ten days. On November 3d, G., describing himself as "manager" and his office as a "branch office," acknowledged the receipt of the policy in question "to be replaced by paid-up policy in such amount as has been

agreed upon," and added: "Time extended thirty days in which to reach a decision with regard to taking paid-up policy." It also appeared that G. had many times accepted premiums from the assured, after their maturity, under circumstances which fairly charged defendant with knowledge of the fact, and made their acceptance of the money a ratification of waiver by the agent. W. died November 8th, and two days later his son paid to G. the premium, receiving a receipt therefor. The trial court directed a verdict for defendant. *Held*, error; that the assured was authorized in assuming that G. had authority to continue and carry out the negotiation for an exchange of policies as broad and effective as that of the home office, and had special authority so far as this policy was concerned to waive prompt payment; that the default was occasioned by the acts of such agent; and that it could not be said as matter of law that there was no waiver. *Wyman v. P. M. L. I. Co.* 274

2. Under the provisions of the "act to regulate the forfeiture of life insurance policies" (§ 1, chap. 341, Laws of 1876, as amended by chap. 321, Laws of 1877), which provides that no life insurance company shall have power to declare a policy thereafter issued or renewed by it, forfeited by reason of non-payment of premium, except upon service of a notice upon the assured as prescribed, and a failure to pay within thirty days after such service, the duration and validity of a policy, whatever may be its terms, is not dependent upon payment of premium on the day named, but upon payment within thirty days after notice given; the statute is part of the contract, and governs the rights and obligations of the parties, the same as if all its terms and conditions had been incorporated therein. *Barter v. B. L. I. Co.* 450

3. In an action upon such a policy, before the defendant can raise any question in regard to non-payment of premium, it is necessary for it to show the giving of the statu-

tory notice and the lapse of thirty days thereafter without payment. (ANDREWS, EARL and GRAY, JJ., dissenting.) *Id.*

4. Where, therefore, in such an action there was no proof of payment of the last quarter's premium falling due before the death of the insured, and no proof of the giving of the statutory notice, *held* (ANDREWS, EARL and GRAY, JJ., dissenting), it was to be assumed that the policy was in force at the time of the death of the insured, and the obligation to pay upon death, during the life of the policy, was unimpaired, although the premium was unpaid; and that as the liability of the defendant was fixed by the death, it was not necessary to pay, or tender before suit brought, the premium due and unpaid; the unpaid premium with interest being simply a claim to be deducted by defendant from the sum due upon the policy. *Id.*

INTEREST.

— *When not chargeable on item in recurring account.*
See Ledyard v. Bull 62

JUDGMENT.

1. When an error has been made in the form of a judgment, by which its scope has been enlarged or its amount increased beyond that plainly authorized by a verdict, referee's report or decision of the court, the judgment is not void or inoperative, and no question is presented for the consideration of the court on appeal; the error is an irregularity merely, which must be corrected, if at all, by motion in the court of original jurisdiction, to be made within one year after notice of the judgment or filing of the judgment-roll. (Code of Civ. Pro. §§ 724, 1282.) *C. E. Bank v. Blye.* 414

2. In an action to recover possession of certain bonds, with damages for detention, the court ordered a verdict for plaintiff, and, with the consent of both parties, ordered an assessment for the value

of the property, "including damages," at \$25,315.18, and a verdict was rendered accordingly. Judgment was entered directing a delivery of the bonds, with \$2,315.18 damages for their detention, and, in case delivery should not be had, that plaintiff recover \$25,315.18. A copy, with notice of entry, was served upon defendant, who appealed. After affirmance of judgment on appeal, and more than a year after such service, defendant moved to vacate so much of the judgment as provided for payment of damages in case of return of the bonds. *Held*, that the question was not presented on the appeal, and so the decision thereon did not deprive the court of jurisdiction to hear the motion; but, *held*, that the court had no authority so to do because it was made after the expiration of the time limited. *Id.*

3. Upon a motion to vacate a judgment entered as by default, in an action commenced by the service of summons and complaint on March sixth, it appeared that an answer setting up a defense was mailed at C., where defendant's attorney resided, to plaintiff's attorney at R., where he resided, on the evening of March twenty-sixth. Judgment was entered by default March twenty-seventh. Defendant showed merits. The court denied the motion, but allowed the defendant to come in and defend, the judgment to stand as security. *Held*, error; that the entry of judgment was premature, and defendant's right to have it set aside could not be clogged with the condition that it should stand as security. *Yates v. Guthrie.* 420

— *After judgment in penal action the original wrong is merged therein, and the judgment has all the attributes of a judgment ex contractu.*

See Carr v. Rischer. 117

See CONFESSION OF JUDGMENT.

JUDICIAL SALES.

1. The judgment in an action to foreclose a mortgage executed by a telegraph company to secure its

bonds, recited the amount due upon the bonds as it appeared by affidavit, ordered the referee appointed to sell to ascertain and report the amount due "on such bonds as may be ascertained and reported by such referee to be secured by said mortgage," with the names of the persons holding them and by what title, and to sell, unless previous to the sale "the amount herein found as actually due and payable" shall be paid. The referee did not, prior to the sale, report the amount due; his report of sale was confirmed. On motion by a bondholder to set aside the sale, upon the ground that the failure to make such report rendered the sale illegal, *held*, that the court below was competent to interpret its own judgment, and its confirmation of the sale showed its understanding to be that the reference as to amount of bonds was to be executed after sale. Also, *held*, that, inasmuch as it appeared that the entire proceeds of the foreclosure would be exhausted in paying claims paramount to the bonds, the omission to execute the reference before sale, conceding it was required by the judgment, was at most a harmless irregularity; and that the court below had power, in its discretion, to refuse to set aside the sale on that account. *F. L. & T. Co. v. B. & M. T. Co.*

15

2. The judgment did not expressly authorize the referee to execute a deed to the purchaser; it provided that the purchaser should be entitled to possession on production of his deed, and that the mortgagor and its receiver should join in the deed. It was claimed that the referee had no authority, under the judgment, to execute a deed. *Held*, untenable; that such authority was to be understood from the language of the judgment; also, that as the court below had sanctioned the giving of the deed and thus construed its judgment, no ground of complaint on that account remained. *Id.*

3. The judgment provided that the purchaser should pay a certain amount of the purchase-price in

cash, and that the balance might be paid in receiver's certificates or in bonds, to be received at a *pro rata* rate, as provided. Upon the sale the purchaser paid the cash required and delivered to the referee what was supposed, at the time, to be a sufficient amount of certificates, but which afterward proved insufficient to pay the balance of the purchase-money; he also gave ample security to pay any balance that might be found due. In confirming the referee's report, the court ordered that the referee should inquire and report to the court what receiver's certificates should have been or should be accepted by him in payment for the purchase-price, and how much, if anything, was due upon the purchase-price. It was claimed the full purchase-price should have been paid before the deed was delivered. *Held*, untenable. *Id.*

4. Prior to the sale a reorganization agreement had been entered into, to which the petitioner was a party. *Held*, that the court was not obliged to set aside the sale because such agreement had been violated; that the court, in its discretion, could leave the petitioner to pursue its remedy by action. *Id.*

5. The petitioner did not offer to bid for the property upon a resale any more than the price for which it was sold, and did not show that anyone would bid any more; also, with knowledge of all the essential facts, it delayed for nearly two years before making the application. In the meantime the property had gone into the hands of a new corporation, which had expended large sums of money thereon, had mortgaged the same to secure bonds, and had issued stock to a large amount; so that if a resale were ordered it would be impossible to restore the parties to be affected thereby to their former position, and irreparable mischief might be done. *Held*, that the petitioner had no absolute legal right to have the sale set aside, that the court below had discretion to deny the application; that it did not appear that it had abused its discretion, and, therefore, this

court had no jurisdiction to review the order appealed from. *Id.*

—As to what will vitiate sale on foreclosure of chattel mortgages.

See Casserly v. Witherbee. 522

See EXECUTION.

JURISDICTION.

1. A court of original jurisdiction has not power, before judgment in an action in which a receiver *pendente lite* had been appointed on the application of the plaintiff, to make an order continuing the receivership, after judgment shall have been rendered, during the pendency of any appeal which may be taken therefrom. *Colwell v. G. N. Bank.* 408
2. In cases where the provisions of the Code of Civil Procedure, in reference to the appointment of receivers (§ 713) are applicable, and they furnish an adequate remedy, the power of the court is limited by that section, and it must proceed in the manner therein provided, otherwise its orders will be void. *Id.*
3. *It seems* the court may appoint a receiver after judgment, and pending an appeal, although the judgment denies relief to the plaintiff; but the Code contemplates that such application will be made upon the whole case, including the adverse judgment, and does not permit the order to be made in anticipation of the judgment. *Id.*
4. The courts have no power to take proof as to the constitutionality of a statute, and extraneous testimony either of experts or other witnesses is not admissible to show that, in carrying it out, some provision of the Constitution may be violated. If it cannot be made to appear that the statute is unconstitutional by argument deduced from the language of the law itself, or from matter of which the court can take judicial notice, it must stand. *People ex rel. v. Durston.* 569
5. Although a copy of the record has been filed with the clerk of

this court, on appeal to it, the court below so far retains jurisdiction of the case as to enable it to make such amendment as it shall deem proper, and to order the amendment to be duly certified to, and filed with the said clerk, and when duly filed, it is to be regarded as part of the original return. *Peterson v. Swan.* 662

7. Where in answer to application to surrogate to compel executor to file inventory or to account, it appears by answer, that right of petitioner has been satisfied or barred by a release, surrogate has no jurisdiction and must dismiss proceedings although the fact of settlement or release is denied, or it is questioned on ground of fraud. *In re Wagner.* 28

LAKE ONTARIO.

Black River bay is part of Lake Ontario, within the meaning of the act of 1886 (Chap. 141, Laws of 1886), prohibiting the killing or taking of fish by nets in certain portions of said lake. *Lawton v. Steele.* 226

LARCENY.

1. The provisions of the "Factors Act" (Chap. 179, Laws of 1830), declaring that every factor or other agent intrusted with the possession of merchandise or the documentary evidence of title thereto "for the purpose of sale * * * shall be deemed to be the true owner, so far as to give validity to any contract made by such agent with any other person for the sale or disposition * * * of such merchandise," has no application when a factor or agent has obtained goods taken by a common-law larceny from the true owner. *Soltan v. Gerdau.* 380
2. One S., a rubber broker, by means of false and fraudulent representations that he had effected a sale of a quantity of rubber for plaintiff; obtained from him a delivery order for the rubber, then on board of a steamboat, for the purpose of delivery to the alleged purchaser.

By means of such order S. obtained possession of the rubber, stored it and took a warehouse receipt therefor in his own name, which he delivered to defendant to secure an advance, to be paid on sale of the rubber. Defendant sold, and after deducting the advance, paid over the balance to S. In an action to recover possession of the rubber, *held*, that S. obtained possession by larceny; and so that defendant acquired no title and was liable for a conversion. *Id.*

LEASE.

1. Plaintiff was assignee of two leases, executed by defendant, of ferries between New York city and Staten Island; it also owned a railroad which it operated in connection with said ferries. The lessees were bound simply to run their boats to the island, they being free to choose their port of arrival and departure; they agreed to pay defendant certain percentages upon the gross receipts annually. One of the leases fixed the minimum rate of ferriage at five cents per person, the other fixed no minimum rate. Plaintiff selected St. George as the port, and charged for each passenger stopping there ten cents and the same price for passengers taking the railroad to other places, of which it allowed five cents for ferriage. The city had knowledge of this, its commissioner of accounts having investigated plaintiff's books of receipts, ascertained the division made, assented to the basis adopted and thereafter accepted the percentages founded upon that division. In an action to restrain the city from declaring the leases forfeited because of plaintiff's refusal to pay the percentage upon its entire gross receipts, *held*, that plaintiff was entitled to the relief sought; that the fact one sum was paid for passage over the ferry and railroad did not make the whole ferry receipts, and plaintiff was not bound to pay the city anything on account of its railroad fares; that the reduction of ferriage to passengers taking the railroad was not violative of the leases; that if plaintiff has

made a wrong discrimination among its passengers it is a public wrong and not one to the city as lessor; and that the only question was what have been in truth and in fact the actual ferry receipts, not what they ought to, or might have been. *S. I. R. T. R. R. Co. v. Mayor, etc.* 96

2. In an action for the specific performance of an alleged agreement for the leasing of certain premises by defendant to plaintiff, the making of which plaintiff denied, the only evidence to establish the agreement was certain letters, one from plaintiff offering to lease the premises for a term of years at a rent specified, the buildings thereon to be altered similar to those a certain firm named "is now altering, * * * plans, etc., to be mutually agreed upon;" a reply from defendant acknowledging receipt of plaintiff's letter, and saying "I hereby accept your offer," and a letter from him four days later in which he states his counsel advises him "that there are difficulties which will prevent the making of a lease as proposed," adding, "you will, therefore, understand that the proposed lease cannot and will not be made." *Held*, that said letters did not constitute a completed agreement to lease; but an agreement in substance that, if the parties should thereafter agree upon plans for the alteration of the building, a lease would be given upon the terms specified; that it was immaterial what reason defendant gave, or what motive actuated him in his refusal to agree upon plans; that he had a right to insist upon such an agreement before plaintiff's right to demand a lease should arise; also, that plaintiff was not entitled to waive the condition as to alterations, and to demand a lease without an agreement as to plans. *Mayer v. McCreery.* 484

LEGATEES, NEXT OF KIN, HEIRS AND DEVISEES.

Where all the parties interested in an intestate's estate are of full age, and one of them, with the assent

of the others, undertakes to administer upon the estate without the issuing of letters of administration, settles all claims against the estate, states an account and distributes the balance so shown to be on hand for distribution, and each of the other parties interested takes his or her share, the settlement is, so far as it goes, binding, and no one of them can thereafter claim, through a formal administration, a new distribution; and this is so, in the absence of any claim of fraud or mistake, although it appears that the party making the distribution credited himself in the account with the amount of an indebtedness of the intestate to him, which was not questioned by the others. *Ledyard v. Bull.* 62

LIEN.

In an action to foreclose a second mortgage upon certain lots in the city of New York, the first mortgagee was made a party, and payment of the first mortgage was adjudged to be made out of the proceeds of the sale. Other persons who held subsequent mortgages, covering in whole or in part, said lots, which took effect at different dates, were made parties to the action. The decree of sale provided for a sale of the lots in separate parcels in the inverse order of the giving of the mortgages. A surplus having arisen on sale of all the lots, the court below directed a distribution, according to the priorities as liens of the various subsequent mortgages. *Held*, no error; that the decree did not and could not settle the priorities and equities of the subsequent incumbrances; that the whole proceeds of sale formed a common fund, to be applied first to the payment of the first and second mortgages, the surplus to the payment of the subsequent liens in the order of their priority, subject to the limitation that no greater amount should be paid in discharge of a lien on any lot than was realized for the lot at the sale; that, therefore, the surplus could not be regarded as constituting a specific fund, subject to the specific liens upon the last lot sold,

but as a common fund distributable to all lienors in the order of the date when their mortgages became liens. *Burchell v. Osborne.* 486

See MECHANIC'S LIEN.
MORTGAGE.

LIMITATION OF ACTIONS

1. Where a county treasurer applies taxes collected in a town in payment of county and state taxes instead of applying them in payment of the town bonds as required by statute, the cause of action arises when the misappropriation is made; the statute of limitations then begins to run against it, and an action brought more than six years thereafter is barred. *Strough v. Suprs. Jeff. Co.* 212
2. While every duty imposed upon a public officer is in the nature of a trust, persons injured by a violation of the duty for which they may maintain an action at law, must pursue that remedy within the period of limitation of legal actions. *Id.*
3. In an action, under the act of 1855 (Chap. 428, Laws of 1855), to recover compensation for property destroyed in consequence of a mob or riot, it appeared that an action was begun in the County Court for the same cause within the three months limited by said act, in which the complaint was dismissed for want of jurisdiction in that court to entertain actions brought to recover a sum exceeding \$1,000; thereafter, this action was commenced, but after the lapse of the statutory period. *Held*, that the action was not maintainable; that as it was brought under special law and was maintainable solely by its authority, the limitation was so incorporated with the remedy given as to make it an integral part of it and was a condition precedent to the maintenance of the action at all; and that the provision of the Code of Civil Procedure (§ 405) providing that when an action is commenced within the time limited and is terminated "in

any other manner than by voluntary discontinuance, dismissal for neglect to proceed, or a final judgment on the merits, the plaintiff may commence a new action for the same cause within one year after," such termination, did not apply. (See § 414.) *Hill v. Suprs. Rens. Co.* 344

MANDAMUS.

1. In proceedings by mandamus to compel defendants, who were members of a board of inspectors of election, to affix their signatures to the election returns, it appeared that after the closing of the polls the inspectors counted the ballots cast and declared the result, but defendants refused to affix their signatures upon the ground that fraudulent votes were cast by persons who were not themselves registered, but who falsely personating registered voters, upon being challenged, complied with statutory tests. *Held*, that it was the duty of the inspectors to count and return all the votes cast, and of each to attach his signature to the return; and that a peremptory writ was properly granted. *People ex rel. v. Bell.* 175

2. Madamus is a proper remedy to compel the performance by the board of assessors of the city of Brooklyn of their duty to rectify clerical errors in assessments. *People ex rel. v. Wilson.* 515

3. When an order has been made granting the writ, the fact that it does not affirmatively appear that the relator, before the commencement of the proceedings, applied to the board to correct the mistake, is not a jurisdictional defect, requiring the reversal of the order. *Id.*

4. Upon the application for a mandamus to compel the correction of such an assessment, it appeared that the board of assessors included by mistake, in an assessment for re-paving, a lot of the relator outside of the district of assessment, and that the collector was proceeding to collect the same by levying on the relator's prop-

erty. *Held*, the collector was properly joined as a party in the proceeding. *Id.*

5. It was claimed that no remedy was open to the relator for the reason that the assessment had been confirmed by the common council, and that an assessment so confirmed is declared by the charter (Tit. 18, § 36) to be "final and conclusive." *Held*, untenable; that this provision did not apply to a case where the assessment is without jurisdiction and so void. *Id.*

MANUFACTURING CORPORATIONS.

It seems an action against a director of a corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848) to recover a debt due from the company because of failure of defendant to make and file an annual report as required by the act (§ 12) is a penal action and abates upon the death of either party before verdict. *Carr v. Rischer.* 117

MARRIED WOMEN.

1. Plaintiff in 1836 joined with her husband in a mortgage upon his land. In 1838 they were both made parties to a suit for the foreclosure of the mortgage. No copy of the writ of subpœna was served upon her; one was served upon the husband, and one delivered to him with the request to hand it to her; she was at the time under age. A judgment of foreclosure and sale was entered, under which the premises were sold. The husband died in 1882. In an action to recover dower, *held*, that under the rule and practice in chancery proceedings in force at the time of the foreclosure, personal service of the writ upon plaintiff was not necessary, but service on the husband was a good service on both, and this was so although she was at the time under age; and that, therefore, the action was not maintainable. *Feitner v. Lewis.* 131

2. In an action for specific performance of a contract for the sale of land, it appeared that the contract was executed by defendants F. and R., in whom was the title. Their wives were also made defendants. They all joined in the answer, which recites, "defendants further admit that they did promise to convey the said premises to the plaintiff," and the only issue tendered therein or litigated was that the contract in suit was induced by the fraudulent representations of plaintiff. There was no allegation that the wives were not parties to the contract, or were not bound thereby. The issue of fraud was decided against defendants, and the judgment required their wives to join with their husbands in the conveyance directed. The defendants jointly excepted to the findings of facts and law, but none of the exceptions were directed toward said provision of the judgment. The General Term reversed that part of the judgment on the ground that the wives were not parties to the contract. *Held*, that as there was no special exception pointing out the objection, the reversal by the General Term was error. *Schoonmaker v. Bonnie.* 565

3. *It seems* that had the objection been raised on the trial, and presented by a proper exception, it would have been valid. *Id.*

4. As to whether the court has power to specifically enforce a contract by a married woman to release her dower interest, made upon a consideration passing to her husband, when they were residents of, and the contract was made in another state, in which the common-law disabilities of married women still exist, *quære.* *Id.*

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. While the common-law rule that the contract relations of master and servant are dissolved by the death of either party, has been limited, it still applies in cases in which

the relation may be deemed purely personal and involves neither property rights nor independent action; it applies both to the contract of the master and to that of the servant, and includes as well cases where the services are those of unskilled as where they are of skilled labor. *Lacy v. Getman.* 109

2. Plaintiff contracted orally with McM., defendant's testator, to work upon his farm as an ordinary farm laborer for one year, commencing in March. Plaintiff entered upon the service and worked under the direction of McM. until in July when the latter died, leaving a will by which he gave his widow a life estate in the farm and the use and control for life of all his personal property in the house and on the farm. Plaintiff knew in a general way the terms of the will; he continued on without being hired or employed by McM.'s executrix until the close of the year, doing the farm work under the direction of the widow. In an action against the executrix to recover for his services for the whole year, *held*, that upon the death of McM. the contract terminated, and the plaintiff was only entitled to recover the proportionate amount earned at the death of McM. *Id.*

3. The degree of care required of an employer in protecting his employees from injury, is the adoption of all reasonable means and precautions to provide for their safety while in the performance of their work. *Dobbins v. Brown.* 188

4. Neglect, on the part of the employer, to exercise such care, must be proved by direct evidence or by proof of facts from which the inference of negligence can be legitimately drawn by the jury. *Id.*

5. The mere fact that an accident occurred which caused an injury is not generally of itself sufficient to authorize an inference of negligence. *Id.*

6. In an action to recover damages for the death of D., plaintiff's intestate, a servant in defendants'

employ, alleged to have been caused by defective apparatus provided by the latter, it appeared that D.'s death was caused by a fall from a bucket, which was being lowered in a shaft to convey workmen to a tunnel, their place of labor. The only survivor of the accident testified, that after the bucket got about half way down the shaft, something came from above and knocked him out of it. After the accident the cable supporting the bucket and dummy yoke was found to be broken at a point above the bucket, where a chain connected with the cable, and a shoulder had been placed for the support of the dummy-yoke when in position; the dummy-yoke broken, with the bucket and a portion of the chain, were found lying together at the bottom of the shaft. There was no evidence but that similar apparatus and appliances were generally in use in deep shafts for mining purposes in this country, and in some instances it appeared they were required by law to be used. There was no proof of any defect in the plan or structure of the apparatus used, or that it was not well constructed. The court charged that the jury might infer that the accident occurred from the accidental stoppage of the dummy-yoke or follower at some point in the course of its descent, and its sudden fall thereafter from a great distance upon the bucket. *Held*, error; that the evidence was insufficient to support such an inference; also, that it was for plaintiff to show how the accident occurred, and to prove negligence of defendants in respect to some matter which caused it; and that the evidence failed to show this. *Id.*

7. A railroad corporation, for the safety of its passengers as well as its employes, is bound to use suitable care and skill in furnishing not only adequate engines and cars, but also a safe and proper track and road-bed. The track must be properly laid, the road-bed properly constructed, and reasonable prudence and care exercised in keeping the track free from obstructions, animate and

inanimate, and if, from want of proper care, such obstructions are permitted to be, or to come upon the track, and a train is thereby wrecked, the corporation is responsible for injuries received by any person thereon, whether passenger or employe. *Donnegan v. Erhardt.* 468

MERGER.

—*After judgment in penal action original wrong merged therein, and judgment has all the attributes of judgment ex contractu.*
See Carr v. Rischer. 117

MONEY HAD AND RECEIVED.

Where a county treasurer, instead of applying taxes assessed on the property of a railroad corporation in a town to the payment or redemption of bonds of the town, issued in aid of the construction of the road of such corporation, as required by the act of 1869 (Chap. 907, Laws of 1869), as amended in 1871 (Chap. 283, Laws of 1871), applied them in payment of county and state taxes, with and as part of, other moneys raised by the town for those purposes, *held*, that an action, as for money had and received, was maintainable on behalf of the town against the county to recover the money so misappropriated. *Strough v. Suprs. Jeff. Co.* 212

MORTGAGE.

The will of S. devised his real estate to his wife as long as she should remain his widow, and upon her death or remarriage to their children. He made her executrix, and the will authorized her to make advances from the property, from time to time, in her discretion, to the children "for maintenance and support." and empowered her to mortgage, lease and dispose of such property for the purpose of carrying into effect the provisions of the will. The widow married and subsequently executed a mortgage on said real estate in her individual name to secure a loan. The mortgage contained no reference to the character

of the mortgagor as executrix, or to the power to mortgage contained in the will. This mortgage was paid from the proceeds of a loan obtained from plaintiff upon a mortgage of the same property, executed by the widow individually and as executrix. In an action to foreclose the latter mortgage, it appeared that plaintiff had knowledge that the purpose of the mortgagor was to pay the prior loan with the money borrowed; such prior loan was procured for the benefit of the widow's second husband. *Held*, that upon the marriage of the widow the fee of the real estate vested in the children, subject to the execution of the power of sale and to the widow's right of dower; that the interest mortgaged must be restricted to the individual interest which the mortgagor had as doweress; that although her dower right while unassigned did not give her a legal estate in the land, it was a legal interest and constituted property capable in equity of being sold, transferred and mortgaged by her. *M. L. I. Co. v. Shipman.* 324

—*It seems, where deed was intended as a mortgage, a conveyance by grantor to wife of grantor and one by her to him operates to discharge mortgage.*

See Dean v. M. E. R. Co. 540

MOTION AND ORDERS.

1. In an action upon an alleged contract to pay a sum specified for services rendered, the issue was as to the terms of the contract, it being conceded that if plaintiff was entitled to recover anything it was the amount claimed, with interest. The court so charged, stating the precise sum plaintiff was entitled to, if the jury found a verdict in his favor. On adjournment of the court for the day, pursuant to stipulation of counsel, the jury were informed that they might seal their verdict; that they need not return in the morning to deliver it, but could deliver it to the officer in charge. The sealed verdict simply stated that the jury found for plaintiff. Upon reading the verdict the

court stated it was a mistrial; no order setting aside the verdict was entered. At the same term a motion was made to amend the verdict, on an order to show cause, granted three days after the verdict, and on affidavits of the jurymen, to the effect that they all agreed upon a verdict for the full amount claimed, but being uncertain as to the exact amount stated by the court, signed the verdict supposing the amount would be inserted; the court amended the verdict by inserting the amount. *Held*, no error; that the court had the power to make the amendment and exercising its discretion was guilty of no abuse thereof. *Hodgkins v. Mead.* 166

2. The granting or withholding of an order of discovery, is a matter within the discretion of the Supreme Court, and its decision, based upon the merits of the application, is not reviewable here. *Finlay v. Chapman.* 404
3. A court of original jurisdiction has not power, before judgment in an action in which a receiver *pendente lite* had been appointed on the application of the plaintiff, to make an order continuing the receivership, after judgment shall have been rendered, during the pendency of any appeal which may be taken therefrom. *Colwell v. G. N. Bank.* 408
4. In cases where the provisions of the Code of Civil Procedure, in reference to the appointment of receivers (§ 713) are applicable, and they furnish an adequate remedy, the power of the court is limited by that section, and it must proceed in the manner therein provided, otherwise its orders will be void. *Id.*
5. When an error has been made in the form of a judgment, by which its scope has been enlarged or its amount increased beyond that plainly authorized by a verdict, referee's report or decision of the court, the judgment is not void or inoperative, and no question is presented for the consideration of the court on appeal; the error is an irregularity merely, which

must be corrected, if at all, by motion in the court of original jurisdiction, to be made within one year after notice of the judgment or filing of the judgment-roll. (Code Civ. Pro. §§ 724, 1282.) *C. E. Bank. v. Blye.* 414

6. In an action to recover possession of certain bonds, with damages for detention, the court ordered a verdict for plaintiff, and, with the consent of both parties, ordered an assessment for the value of the property, "including damages," at \$25,315.18, and a verdict was rendered accordingly. Judgment was entered directing a delivery of the bonds, with \$2,315.18 damages for their detention, and, in case delivery should not be had, that plaintiff recover \$25,315.18. A copy, with notice of entry, was served upon defendant, who appealed. After affirmance of judgment on appeal, and more than a year after such service, defendant moved to vacate so much of the judgment as provided for the payment of damages in case of return of the bonds. *Held*, that the question was not presented on the appeal, and so the decision thereon did not deprive the court of jurisdiction to hear the motion; but *held*, that the court had no authority so to do because it was made after the expiration of the time limited. *Id.*

7. Upon a motion to vacate a judgment entered as by default, in an action commenced by the service of summons and complaint on March sixth, it appeared that an answer setting up a defense, was mailed at C., where defendant's attorney resided, to plaintiff's attorney at R., where he resided, on the evening of March twenty-sixth. Judgment was entered by default March twenty-seventh. Defendant showed merits. The court denied the motion, but allowed the defendant to come in and defend, the judgment to stand as security. *Held*, error; that the entry of judgment was premature, and defendant's right to have it set aside could not be clogged with the condition that it should stand as security. *Yates v. Guthrie.* 420

8. In an action for divorce, brought by the wife, a motion for a temporary allowance and counsel fee was denied by the Special Term, on the ground that final judgment had been rendered for plaintiff, awarding her alimony and costs, and that, although the defendant had appealed therefrom and procured a stay, and the wife had no means of support or for defending the appeal, yet the court was without power to grant the relief desired. This order was reversed by the General Term, and the case remitted to the Special Term for a decision on the merits. *Held*, that the order of the General Term was not final, and so was not appealable to this court. *McBride v. McBride.* 510

9. *It seems* that power exists in such a case to make the allowance sought during the pendency of the appeal from the judgment and until the final determination of the action. (Code Civ. Pro. § 1769.) *Id.*

10. A motion to remit a record filed with the clerk on appeal to the court for the purpose of permitting the court below to amend the record, if it should desire so to do, is unnecessary and should be denied, as the one below has power to amend. *Peterson v. Swan.* 662

MUNICIPAL CORPORATIONS.

— *As to limitation of liability of cities and counties for property destroyed by mob.*

See Hill v. Supra. Rens. Co. 344

See BROOKLYN (CITY OF).

COUNTIES.

NEW YORK (CITY OF).

TOWNS.

MURDER.

Upon the trial of an indictment for murder, evidence was admitted as to quarrels between defendant and deceased, and as to conversations between them. *Held*, proper, as tending to show the existence of motive. *People v. Kemmler.* 580

NEGLIGENCE.

1. In an action to recover damages for injuries alleged to have been caused by defendant's negligence, plaintiff's evidence was to this effect: Plaintiff, a child two years of age, lived with her parents on the first floor of a building fronting on a street twenty-six feet wide from curb to curb, through which defendant's road runs; her father carried on the bakery business on the same floor. Plaintiff was with her father in the store, the door of which, on account of the heat, was left open. She went behind the counter, and while he supposed she still remained there she escaped into the street and was run over by one of defendant's cars. She had been out of her father's sight not more than two minutes. Plaintiff was nonsuited on the ground that her parents were negligent, in omitting to exercise a proper degree of care and watchfulness. *Held*, error; that the question was one of fact for the jury. *Weil v. D. D., E. B. & B. R. R. Co.* 147

2. The degree of care required of an employer in protecting his employes from injury, is the adoption of all reasonable means and precautions to provide for their safety while in the performance of their work. *Dobbins v. Brown.* 188

3. Neglect on the part of the employer, to exercise such care, must be proved by direct evidence or by proof of facts from which the inference of negligence can be legitimately drawn by the jury. *Id.*

4. The mere fact that an accident occurred which caused an injury is not generally of itself sufficient to authorize an inference of negligence. *Id.*

5. In an action to recover damages for the death of D., plaintiff's intestate, a servant in defendants' employ, alleged to have been caused by defective apparatus provided by the latter, it appeared that D.'s death was caused by a fall from a bucket which was being

lowered in a shaft to convey workmen to a tunnel, their place of labor. The only survivor of the accident testified, that after the bucket got about half way down the shaft something came from above and knocked him out of it. After the accident the cable supporting the bucket and dummy-yoke was found to be broken at a point above the bucket, where a chain connected with the cable, and a shoulder had been placed for the support of the dummy-yoke when in position; the dummy-yoke broken, with the bucket and a portion of the chain, were found lying together at the bottom of the shaft. There was no evidence but that similiar apparatus and appliances were generally in use in deep shafts for mining purposes in this country, and in some instances it appeared they were required by law to be used. There was no proof of any defect in the plan or structure of the apparatus used, or that it was not well constructed. The court charged that the jury might infer that the accident occurred from the accidental stoppage of the dummy-yoke or follower at some point in the course of its descent, and its sudden fall thereafter from a great distance upon the bucket. *Held*, error; that the evidence was insufficient to support such an inference; also, that it was for plaintiff to show how the accident occurred, and to prove negligence of defendants in respect to some matter which caused it; and that the evidence failed to show this. *Id.*

6. In an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appeared that plaintiff, a woman thirty-five years old, had been in the habit, for ten years, of making purchases frequently at defendant's drygoods store; that she fell while descending a broad, carpeted staircase in said store, which staircase was safely, properly and conveniently constructed in all respects. The only proof upon which the claim of negligence was founded was the presence of a figure for exhibiting children's clothing upon the steps next the

railing, and the absence from the steps of footholds, *i. e.*, brass plates or rubber pads. At the close of the evidence a motion was made for a nonsuit, which was denied. *Held*, error; that there was no evidence of negligence on the part of defendant which could properly have been submitted to the jury; that while the business of the defendant was, from its very nature, an invitation to the public to enter upon his premises, and he was bound to use reasonable prudence and care in keeping his store in such a condition that those so entering were not unnecessarily or unreasonably exposed to danger, his duty was measured by and limited to such reasonable prudence and care. *Larkin v. O'Neill.* 221

7. In an action to recover damages for the death of D., plaintiff's intestate, alleged to have been caused by drinking unwholesome water from a well, used gratuitously by the public, belonging to defendant, and under its control, it was not claimed either that the well or pump was improperly constructed or out of repair, that the water became unwholesome from any defect in the well, or from any external exposure which could, by any reasonable care, have been avoided; that defendant, or any of its officers, or anyone, did anything to render the water impure; that anything could have been done to purify it or prevent its impurity, which could only be discovered by a careful chemical analysis; or that defendant, prior to the death of D., had notice of the unwholesome character of the water. The well had been extensively used for years, and there was no proof that prior to August, 1882, the water had caused any injury. D. died August 24, 1882. The plaintiff was nonsuited. *Held*, no error; that while it was the duty of defendant to use reasonable diligence to keep the well in repair and to guard against any dilapidation or danger resulting from its use, it was not an insurer of the quality of the water, and to authorize a recovery it was necessary for plaintiff to show willful misconduct or culpable neglect, and this the evi-

dence failed to do. *Danaher v. City of Brooklyn.* 241

8. In an action to recover for the conversion of certain bonds, it appeared that plaintiff, a regular customer of defendant, deposited the bonds with it as collateral security for discounts. Discounts and renewals upon the security of such bonds were obtained by plaintiff, from time to time, during a period of four years. When the last note so discounted was paid, defendant's cashier, at his own suggestion, delivered to plaintiff a receipt signed by him as cashier, acknowledging the receipt of the bonds as collateral and stating that all loans having been paid, the bonds were retained for future like use or safe keeping, subject to plaintiff's order. Defendant thereafter, as it had done before, paid the coupons falling due on the bonds to plaintiff until October, 1887. In February, 1888, plaintiff demanded a return of the bonds but was informed that they could not be found; no information was afforded him in respect to the circumstances attending their disappearance or the mode by which they had been removed, if at all, from the possession of the bank. Upon the trial defendant gave evidence tending to show that it was its custom to return securities, held as collateral, to the owner upon payment of loans; that while held they were kept with other valuable securities belonging to defendant in a steel box inclosed in an iron safe; that the safe and box had combination locks, the combination on the box being known to defendant's president and cashier alone and the latter alone having the key. It was also proved that the cashier had been in defendant's employ for many years and had borne a good reputation until December, 1887, when he was removed for the alleged reason that he was a defaulter. All of defendant's officers, except said cashier, testified that they had no knowledge of its possession of the bonds or of the place where they were kept after the loans were paid, and that they, respectively, had not abstracted them. Defendant's by-laws provided for the appointment

by its president once at least in every three months of a committee, consisting of two members of the board, who with the president and cashier should constitute a committee of examination, and they were required to examine all matters "pertaining to the affairs of the institution" and report the same. Examinations were only made once in six months by three examiners and were confined to the securities owned by defendant and those it held as collateral for unpaid loans. The reports showed no account of such collaterals or of special deposits. Defendant was accustomed to receive special deposits from its customers for safe keeping, which were usually kept in the vault, but were not entered upon its books, and no subsequent examination, inspection or report in relation thereto was ever made or provided for. No other evidence was given as to the disappearance of the bonds. Defendant's cashier was not called as a witness. *Held*, that defendant was not a gratuitous bailee, but the bailment was one for mutual benefit, and it was liable, at least, for failure to exercise ordinary and reasonable care and diligence in the custody of the bonds; that it was within the authority of the cashier to make the agreement on its part to continue as custodian of the bonds, for the purpose for which they had theretofore been used, and the fact that all the loans were paid did not change the character of its liability; that the evidence failed to show the exercise on its part of the requisite degree of care and justified a submission of the case to the jury and a verdict for plaintiff. *Ouderkirk v. C. N. Bank.* 263

9. A railroad corporation, for the safety of its passengers as well as its employes, is bound to use suitable care and skill in furnishing not only adequate engines and cars, but also a safe and proper track and road-bed. The track must be properly laid, the road-bed properly constructed, and reasonable prudence and care exercised in keeping the track free from obstructions, animate and inanimate, and if, from want of

proper care, such obstructions are permitted to be, or to come upon the track, and a train is thereby wrecked, the corporation is responsible for injuries received by any person thereon, whether passenger or employe. *Donnegan v. Erhardt.* 468

10. In an action to recover damages for injuries received by plaintiff, who was a brakeman in the employ of defendant, it appeared that the injuries were caused by a collision in the night-time between the train upon which plaintiff was employed and a horse which plaintiff claimed came upon the track through defendant's negligence in permitting the fence along its road to become out of repair. The case was submitted to the jury, with instructions that if the horse came upon the track through a fence which defendant was bound to maintain and keep in repair, and which was negligently permitted to be out of repair, plaintiff could recover. *Held*, no error. *Id.*
11. Under the provision of the General Railroad Act (§ 44, chap. 140, Laws of 1850), requiring railroad corporations to build and keep in repair fences on the sides of their roads, and providing that they "shall be liable for damages which shall be done * * * to any cattle, horses, sheep or hogs thereon," an absolute duty is imposed upon said corporations to fence their tracks, not simply to protect the lives of animals, but also to protect persons upon their trains, and for violation of said statutory duty, causing injury, such a corporation is liable. *Id.*
12. *It seems* that, independent of the statute, a jury may find that it is the duty of a railroad company to fence its track to guard against such dangers. *Id.*

NEW YORK (CITY OF).

1. A decision denying an application of one party aggrieved, to vacate an assessment for a local improvement in the city of New York, does not validate the whole assess-

- ment, or bind or affect other parties aggrieved by it. *In re Rosenbaum.* 24
2. In proceedings to vacate an assessment imposed on the petitioner's property in 1872, on the ground that a portion of the work was done under a contract entered into without advertisement or opportunity for competition, it appeared that in similar proceedings by another petitioner to vacate an assessment on his property for the same improvement, the assessment was sustained. In the former proceedings there was no proof that the price for the work was excessive or unfair, while in this it appeared that on the same day the contract in question was made, contracts for similar work, as to which competition was permitted, were made at a much less price. At the date of the former decision there was no provision for reducing the assessment without vacating it wholly. *Held*, that the doctrine of *stare decisis* did not make the former decision conclusive in this case. *Id.*
 3. Also, *held*, that the act of 1874 (Chap. 313, Laws of 1874) did not bar a reduction of the assessment for the illegality complained of, and that an order making such a reduction was proper. *Id.*
 4. H., plaintiff's assignor, entered into a contract with defendant for regulating and grading one of its streets. By the contract, plaintiff agreed to complete the work in 320 days after its commencement, and in case of failure so to do, to pay inspectors' wages for excess of time employed. It was stipulated that in computing the time "the total time during which the work of completing the contract is delayed in consequence of any act or omission" of defendant, which, it was stated, should be determined and certified to by the commissioner of public works, should be excluded. The work was not completed in the 320 days, and defendant retained the inspectors' fees for the extra time. In an action to recover, among other things, the amount so retained, plaintiff claimed that the work was delayed because of obstructions left by defendant on the street, and that it was completed within 320 days after their removal. *Held*, that by the terms of the contract it was a condition precedent to any right of the contractor to be relieved from the allowance of inspectors' fees, to have the matter submitted to and determined by the commissioner, and in the absence of proof that this had been done, or that the commissioner had been called upon but had neglected or refused to act, plaintiff could not recover. *Phelan v. Mayor, etc.* 86
 5. Plaintiff also claimed to recover for damages sustained because of the defendant's delay in removing the obstructions. Upon receiving the final payment, plaintiff executed to the city a release of and from all actions, causes of action, damages, etc., which he had resulting or arising from the contract. *Held*, that the release was a good defense to the claim. *Id.*
 6. In an action to have certain taxes imposed upon real estate in the city of New York in and for the year 1882, adjudged void and cancelled, and to restrain their collection, the following facts appeared: The premises were purchased by one D., and were conveyed to him individually prior to the assessment and imposition of the tax; he purchased, however, for and with the moneys of plaintiff, a Roman Catholic church, of which he was pastor. It was common for priests of the church to have church property conveyed to them in this way. Prior to said conveyance, and ever since, said premises were and have been used exclusively for school purposes, under the management of D., as pastor—all branches of common school education being taught. Plaintiff was not incorporated as a religious body until in 1885, when D. conveyed the premises to it. The school has never been incorporated. A judgment was rendered in favor of plaintiff. *Held*, error; that said premises were not a "school-house" within the meaning, and were not exempt under the provisions of the Revised

Statutes (1 R. S. 888, § 4); that plaintiff being, when the tax was imposed, unincorporated, was not a "religious society" within the meaning of the acts (Chap. 282, Laws of 1852, and § 827, chap. 410, Laws of 1882) with reference to exemptions from taxations in the city of New York, which declare that the exemption of a school-house or other seminary of learning shall not apply unless the building is "exclusively the property of a religious society;" that the words refer to a society that has been incorporated. *Church of St. Monica v. Mayor, etc.* 91

7. Plaintiff was assignee of two leases, executed by defendant, of ferries between New York city and Staten Island; it also owned a railroad which it operated in connection with said ferries. The lessees were bound simply to run their boats to the island, they being free to choose their port of arrival and departure; they agreed to pay defendant certain percentages upon the gross receipts annually. One of the leases fixed the minimum rate of ferriage at five cents per person, the other fixed no minimum rate. Plaintiff selected St. George as the port, and charges for each passenger stopping there ten cents and the same price for passengers taking the railroad to other places, of which it allowed five cents for ferriage. The city had knowledge of this, its commissioner of accounts having investigated plaintiff's books of receipts, ascertained the division made, assented to the basis adopted and thereafter accepted the percentages founded upon that division. In an action to restrain the city from declaring the leases forfeited because of plaintiff's refusal to pay the percentage upon its entire gross receipts, *held*, that plaintiff was entitled to the relief sought; that the fact that one sum was paid for passage over the ferry and railroad did not make the whole ferry receipts, and plaintiff was not bound to pay the city anything on account of its railroad fares; that the reduction of ferriage to passengers taking the railroad was not violative of the leases; that if plaintiff has made a wrong

discrimination among its passengers, it is a public wrong, and not one to the city as lessor; and that the only question was what have been in truth and in fact the actual ferry receipts, not what they ought to or might have been. *S. I. R. T. R. R. Co. v. Mayor, etc.* 96

8. The relator, a member of the police force of the city of New York, was dismissed therefrom upon a charge of "conduct unbecoming an officer;" the specification was, that at a named date and place, he was so much under the influence of liquor as to be unfit for duty. It appeared that the relator had served on the police force fifteen years, during which time his record had been in every way excellent and he had drank no intoxicating liquor. On the occasion in question he had been on duty during a strike of street-car drivers, who resisted the running of the cars. For five days he was continuously employed in guarding the cars and repelling attacks upon them. On the morning of the fifth day, which was severely cold, he was ordered out without opportunity to get his breakfast and detailed to guard moving cars; he rode upon the front platforms of such cars until the middle of the afternoon, when he became faint and ill. Upon reporting his illness to the sergeant, the latter took him off the cars and advised him to report sick, but the relator persisted in remaining on duty. Later he took one drink of brandy and peppermint to relieve his illness and the surgeon who saw him at eight o'clock testified that his breath smelled slightly of liquor; that he could walk steadily, and talk coherently, his speech being a little thick; that in his opinion he had been drinking, but was not then intoxicated. The relator was on these facts dismissed from the force. *Held* (RUGER, Ch. J. and GRAY, J. dissenting), that the dismissal was error; that the evidence failed to show any breach of discipline by the relator, or conduct unbecoming an officer; and that, therefore, as the facts admitted of no inference of guilt, of conscious breach of discipline or violation of

rule, the case presented a question of law reviewable by the General Term on certiorari, and also reviewable here. *People ex rel. v. French.* 493

9. The relator, a member of the police force of the city of New York, was dismissed from the force for intoxication. It appeared, that on October fifteenth, he was on duty until five o'clock in the afternoon, when he went home, and after moving his furniture to another house, again went on duty, and during the night came home, settled his house and went to bed. He went on duty at eight o'clock the next morning, and just before that hour, not having had any breakfast, his wife procured some brandy, which, as she alleged, fearing he would be sick, she insisted upon his drinking. After doing so, he went upon duty, and while at his post, between twelve and one o'clock, his wife, still fearing he would be sick, took him more brandy which he drank. About half past one, he went to the station-house, fell down on the floor and was found there intoxicated. It did not appear that he had been advised by any physician to take the brandy for any ailment, or that he had any physical ailment, except he testified that he was sometimes dizzy-headed. It appeared that the relator had been on the force many years and had always before been a sober and faithful officer. *Held*, that the evidence was sufficient to sustain the charge and to authorize the inference that the intoxication was voluntary and blamable; that the fact that relator's wife advised him to drink the brandy did not relieve him from responsibility; and that the exercise of discretion by the commissioners, as to the extent of the punishment, was not reviewable here. *People ex rel. v. French.* 502

10. The members of the police force of the city of New York have a permanent tenure of office and cannot be dismissed until after charges have been preferred, examined, heard and investigated, as provided by the statutes and the rules

adopted by the board of police commissioners. *Id.*

11. *It seems*, that before a police officer can be dismissed from the force for intoxication, it must be shown that the intoxication was of such a character as made it an offense against the rules; *i. e.*, that it was conscious, voluntary, blamable, and in some way due to the officer's fault. *Id.*

12. In the absence of any proof or explanation, the mere fact of intoxication may establish the offense. *Id.*

13. *It seems*, also, that in determining the guilt of a police officer, the police commissioners may not act upon their own knowledge, the charges must be tried and the guilt established on evidence; but in inflicting punishment, they may take into consideration both the evidence and their knowledge of the officer. *Id.*

NEXT OF KIN.

See LEGATEES, NEXT OF KIN, HEIRS AND DEVISEES.

NON-RESIDENTS.

1. The provision of the act of 1883 (Chap. 392, Laws of 1883), declaring that "All debts and obligations for the payment of money due or owing to persons residing within this state * * * wherever such securities shall be held, shall be deemed, for the purpose of taxation, personal property within this state, and shall be assessed as such to the owner or owners," refers to debts or obligations which are solely due or owing to the residents of this state; it does not include as owners persons who are trustees only, and while under the old law if a trustee residing here has possession of such securities he may be assessed for them as a trustee in possession, even if there be other trustees non-residents, the resident trustee may not be assessed for securities not held by him and not within this state, but

which are in the possession of one of the non-resident trustees. *People ex rel. v. Coleman.* 137

2. Accordingly, *held*, where two of three co-trustees resided in this state, and the other resided in another state, the beneficiaries also being non-residents, that an assessment of securities in the hands of the non-resident trustee was void. *Id.*

NOTICE.

1. Actual possession of real estate is sufficient notice to all the world of the existence of any right which the person in possession is able to establish. *Phelan v. Brady.* 587
2. In an action brought to foreclose a mortgage upon certain premises given by M., who held an apparently perfect record title to the same, it appeared that before the execution of the mortgage, M. had conveyed the premises to B., who was in possession, and, with her husband occupied two rooms in the buildings on the premises; he also kept a liquor store in a part thereof; the other rooms she leased to various tenants, claiming to be the owner, and she collected the rents. Her deed was not recorded until after the giving of the mortgage. *Held*, that B.'s actual possession under her deed, although unrecorded, and its existence unknown to plaintiff, was sufficient notice to him of her rights to defeat any claim under the mortgage. *Id.*

NUISANCE.

1. The state legislature has power to declare places or property used to the detriment of public interests or the injury of the health, morals or welfare of the community, public nuisances, although not such at common law. *Lawton v. Steele.* 226
2. *It seems*, however, that this power may not be used as a cover for withdrawing property from the protection of the law, or arbitrarily, where no public right or in-

terest is involved in declaring property a nuisance for the purpose of devoting it to destruction, and if the court can judicially see that the statute is a mere evasion or was framed for the purpose of individual oppression, it may be set aside as unconstitutional. *Id.*

3. The legislature has power to regulate and control the right of fishing in the public waters of the state, and in the exercise of this power may prohibit the taking of fish with nets in specified waters, and by its declaration, make the setting of nets for that purpose a public nuisance. *Id.*
4. Where a public nuisance consists in the location or use of tangible personal property, so as to interfere with or obstruct a public right or regulation, the legislature may authorize its summary abatement by executive agencies without resorting to judicial proceedings; and any injury to or destruction of the property necessarily incident to the exercise of the summary jurisdiction, interferes with no legal right of the owner, and is not violative of the constitutional prohibition against depriving the owner of his property without due process of law. *Id.*
5. The legislature, however, may not decree the destruction or forfeiture of property used so as to constitute a nuisance, and appoint officers to execute its mandate as a punishment of the wrong or even to prevent a future illegal use of the property, it not being a nuisance *per se.* *Id.*
6. *It seems* a public nuisance may only be abated by an individual where it obstructs his private rights, or interferes at the time with his enjoyment of a right common to many, and he thereby sustains a special injury. *Id.*
7. Accordingly, *held*, that the provision of the act of 1883 (§ 2, Laws of 1883, chap. 317), declaring "any net found * * * in or upon any of the waters of this state, or upon the shores or islands in any waters in this state, in vio-

lation of any existing or hereafter enacted statutes or laws for the protection of fish," to be a nuisance, authorizing its summary abatement and destruction by any person, and making it the duty of every fish protector and constable "to seize and remove and forthwith destroy the same," so far as it authorizes the destruction, by a fish protector or constable, of nets found in actual use in the waters of the state, was constitutional; and that its constitutionality was not affected by the authorization also given to private individuals and officers to destroy nets on land. *Id.*

OFFICE AND OFFICER.

Inspectors of election are simply ministerial officers, and a board of inspectors has no discretionary power to reject the vote of a person who, upon being challenged and upon application of the statutory tests, has shown himself qualified to vote. When this is done the offered vote in legal contemplation is finally received, and must be deposited. *People ex rel. v. Bell.* 75

PARTIES.

Question as to non-joinder of parties where alleged defect appears in complaint and is not raised by demurrer, is waived and cannot be raised on trial. *Sullivan v. N. Y. & R. C. Co.* 348

— *When action properly brought for benefit of a town by its supervisor in his name as such officer.*

See Strough v. Suprs. Jeff. Co. 212

PARTNERSHIP.

1. *It seems* an insolvent firm may not apply the firm assets in payment of the individual debts of the partners, nor can the equity of the firm creditors be defeated by a transfer by one of the two copartners, of his interest therein, to the other; they still, as to firm creditors remain firm assets. *Bulger v. Rosa.* 459

2. *It seems*, also, where an individual creditor of one of the members of a firm knowingly takes a transfer of firm property in payment of his individual debt, his act is not merely a violation of an equitable right of a firm creditor, but it constitutes a fraud. *Id.*

3. A firm, although insolvent, has a right, however, to make preferences among its creditors, and one partner may transfer the partnership effects directly to a firm creditor in payment of his debt without the knowledge or consent of his copartner. *Id.*

4. Where S. one of two copartners in a firm which to their knowledge was insolvent, as were also the individual members, assigned and transferred his interest in the partnership assets to B. his copartner, subject to the firm's debts, with the knowledge that the latter intended to transfer them to a firm and individual creditor, which transfer was made in payment of all the creditor's claims, and where in an action of replevin against a sheriff, who had levied upon the property under an execution in favor of a firm judgment creditor, the evidence as to value of the property transferred was conflicting, there being evidence tending to show, and from which the jury would have been authorized to find, that such value was not more than the claim of the transferee against the firm, and, that the object of S. in transferring his interest, was that the property should be used to pay the firm debt, *held*, the fact that the individual debts were named as part of the consideration, was not conclusive evidence of fraud; that the question of fraud in the transfer was one of fact for the jury; and that, therefore, a direction of a verdict for defendant was error. *Id.*

PAYMENT INTO COURT.

1. Under the provision of the Code of Civil Procedure in reference to tender (§ 731) and payment into court of the money tendered, in case of refusal to accept (§ 732)

when the money is so brought into court, it belongs to plaintiff, and his title thereto cannot be disputed, whatever may be the result of the action. *Taylor v. B. E. R. R. Co.* 561

2. The plaintiff, in proceeding after a tender and deposit, simply runs the risk of paying defendant's costs, if the recovery falls short of the amount tendered, while the defendant takes the risk of losing the amount tendered, in the event of his succeeding in the action. *Id.*

PENSIONS.

1. Under the provision of the Code of Civil Procedure (§ 1393) exempting pensions granted by the United States or a state for military or naval services from levy and sale on execution, where the receipts from a pension can be directly traced to the purchase of property necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt. *Y. C. N. Bank v. Carpenter.* 550
2. Where, therefore, a pensioner who had a wife and family purchased a house and lot for a home, paying a portion of the purchase-price out of the proceeds of a pension certificate, and giving a mortgage on the premises to secure the balance, *held*, that the premises were exempt from levy and sale on execution. *Id.*
3. *It seems* that where pension moneys have been embarked in business and mingled with other funds so as to be incapable of identification or separation, the pensioner loses the benefit of the exemption. *Id.*

PHYSICIANS AND SURGEONS.

Upon trial of a criminal action, physicians who had been sent to the jail by the district attorney to make an examination of the prisoner were permitted to testify, as witnesses for the prosecution, to his mental condition, under the objection that either the relation of

patient and physician existed, or else the prisoner was compelled to furnish evidence against himself. *Held*, no error; no evidence having been called for as to the prisoner's statements or as to transactions in the jail. *People v. Kemmler.* 580

PLEADING.

1. Plaintiff's complaint alleged, in substance, the making and delivery by it to W. & Co. of certain drafts, which were set forth, drawn upon defendant, with whom it had sufficient funds on deposit to pay the drafts, and made payable to the order of W. & Co., the indorsement of the drafts by the payees, a presentation and demand for payment, defendant's refusal to pay and protest for non-payment, and that, by reason of the non-payment, plaintiff was compelled to pay the amount of the drafts and take them up. The answer set up simply payment. *Held*, that while the complaint was technically open to criticism, yet it contained a plain statement of the facts from which, as a legal conclusion, plaintiff had a right to recover for a breach of defendant's implied contract to pay out plaintiff's funds, and as defendant could in nowise have been misled a recovery for that cause of action was proper. *C. N. Bank. v. I. & T. N. Bank.* 195
2. *It seems*, the averment that plaintiff repaid the money received for the drafts and took them up, was immaterial to establish a cause of action; the repayment simply established the amount of damages. *Id.*
3. It appeared that W. & Co. purchased from plaintiffs the drafts, which, after indorsing, they delivered to their bookkeeper to be forwarded to certain of their creditors. The bookkeeper erased the indorsements, forged others and used the drafts for his own purposes; they were finally presented by another bank to and paid by defendant. After the forgeries were discovered, and upon the return of the drafts to plaintiff, W. & Co. demanded and

obtained them, and on presentation defendant refused payment on the ground that they had been paid. Plaintiff repaid to W. & Co. the amount paid for them. Defendant offered to prove that before plaintiff paid back to W. & Co. the amount of the dishonored drafts, that firm had settled with their bookkeeper, and for his indebtedness to them, including the appropriation of the drafts, had received certain property. This was objected to and excluded. *Held*, no error; that this evidence was not admissible under the pleadings; also, if an answer had been allowed, it would not have shown that W. & Co. had been paid. *Id.*

4. Where after trial and a decision adverse to plaintiff in an action in which a receiver *pendente lite* had been appointed, but before judgment, an order was granted continuing the receivership until after the decision of any appeal from the judgment, *held*, that the receiver had no authority after the entry of judgment to bring an action to recover a claim, a part of the assets in his hands as receiver; and where the facts appeared in the complaint in such an action, that it was a good ground for a demurrer. *Colwell v. G. N. Bank.* 409

5. In an action brought by plaintiff, as receiver of the P. H. S. & I. Co., the complaint alleged in substance that said company executed to defendant's firm chattel mortgages on all its property, consisting of buildings, machinery, tools, etc.; that default having been made in payment, defendants took possession of the property and sold it at auction, they bidding it in for \$1,000; that none of the property was in view of the persons attending the sale; that it was all put up in a lump and sold together at the request of defendants, although they knew it could be sold in parcels, and greater sums realized for it if so sold; that none of the company's officers were present; that since the sale defendants have claimed to own the property and have sold \$10,000 or

\$15,000 of it; that at the time of the sale the property was worth about \$60,000, and the company's indebtedness to defendants did not exceed \$20,000. The relief asked was that defendants be required to account for the value of the property, and after application of sufficient to extinguish the debt secured that plaintiffs have judgment for the balance. A demurrer to the complaint was sustained because of the omission of an averment of a tender to defendants of the amount conceded to be due and unpaid on the mortgages, or an offer to pay that amount on its being ascertained. *Held*, error; that the sale to defendants was voidable and could be vacated and set aside as part of the relief in this action; that the amount received by defendants on the sales made by them was applicable and must be deemed to have been applied upon the mortgages, and the property remaining in their hands to be held as security for the balance due; that a tender before suit, or an offer in the complaint to pay was not necessary and the omission thereof was only important as bearing upon the question of costs; that the facts alleged in the complaint were sufficient to show a right of redemption in plaintiff, and the action should be treated as one to redeem and for such incidental relief as is necessary to accomplish the redemption. *Cassedy v. Witherbee.* 522

— Question as to non-joinder of parties where alleged defect appears in complaint and is not raised by demurrer, is waived and cannot be raised on trial.

See Sullivan v. N. Y. & R. C. Co. 848

POLICE.

1. The relator, a member of the police force of the city of New York, was dismissed therefrom upon a charge of "conduct unbecoming an officer;" the specification was, that at a named date and place, he was so much under the influence of liquor as to be unfit for duty. It appeared that the relator had

served on the police force fifteen years, during which time his record had been in every way excellent, and he had drank no intoxicating liquor. On the occasion in question he had been on duty during a strike of street-car drivers, who resisted the running of the cars. For five days he was continuously employed in guarding the cars and repelling attacks upon them. On the morning of the fifth day, which was severely cold, he was ordered out without opportunity to get his breakfast and detailed to guard moving cars; he rode upon the front platforms of such cars until the middle of the afternoon, when he became faint and ill. Upon reporting his illness to the sergeant, the latter took him off the cars and advised him to report sick, but the relator persisted in remaining on duty. Later he took one drink of brandy and peppermint to relieve his illness and the surgeon who saw him at eight o'clock testified that his breath smelled slightly of liquor; that he could walk steadily and talk coherently, his speech being a little thick; that in his opinion he had been drinking, but was not then intoxicated. The relator was on these facts dismissed from the force. *Held* (RUGER, Ch. J. and GRAY, J. dissenting), that the dismissal was error; that the evidence failed to show any breach of discipline by the relator, or conduct unbecoming an officer; and that, therefore, as the facts admitted of no inference of guilt, of conscious breach of discipline or violation of rule, the case presented a question of law reviewable by the General Term on certiorari, and also reviewable here. *People ex rel. v. French.* 493

2. The relator, a member of the police force of the city of New York, was dismissed from the force for intoxication. It appeared, that on October fifteenth, he was on duty until five o'clock in the afternoon, when he went home, and after moving his furniture to another house, again went on duty, and during the night came home, settled his house and went to bed. He went on duty at eight o'clock the next morning, and just before

that hour, not having had any breakfast, his wife procured some brandy, which, as she alleged, fearing he would be sick, she insisted upon his drinking. After doing so, he went upon duty, and while at his post, between twelve and one o'clock, his wife, still fearing he would be sick, took him more brandy, which he drank. About half past one, he went to the station-house, fell down on the floor and was found there intoxicated. It did not appear that he had been advised by any physician to take the brandy for any ailment, or that he had any physical ailment, except he testified that he was sometimes dizzy-headed. It appeared that the relator had been on the force many years and had always before been a sober and faithful officer. *Held*, that the evidence was sufficient to sustain the charge and to authorize the inference that the intoxication was voluntary and blamable; that the fact that relator's wife advised him to drink the brandy did not relieve him from responsibility; and the exercise of discretion by the commissioners, as to the extent of the punishment, was not reviewable here. *People ex rel. v. French.* 502

3. The members of the police force of the city of New York have a permanent tenure of office and cannot be dismissed until after charges have been preferred, examined, heard and investigated, as provided by the statutes and rules adopted by the board of police commissioners. *Id.*
4. *It seems*, that before a police officer can be dismissed from the force for intoxication, it must be shown that the intoxication was of such a character as made it an offense against the rules, *i. e.*, that it was conscious, voluntary, blamable, and in some way due to the officer's fault. *Id.*
5. In the absence of any proof or explanation, the mere fact of intoxication may establish the offense. *Id.*
6. *It seems*, also, that in determining the guilt of a police officer, the

police commissioners may not act upon their own knowledge, the charges must be tried and the guilt established on evidence; but in inflicting punishment, they may take into consideration both the evidence and their knowledge of the officer. *Id.*

POSSESSION.

1. Actual possession of real estate is sufficient notice to all the world of the existence of any right which the person in possession is able to establish. *Phelan v. Brady.* 587
2. In an action brought to foreclose a mortgage upon certain premises given by M., who held an apparently perfect record title to the same, it appeared that before the execution of the mortgage, M. had conveyed the premises to B. who was in possession, and, with her husband occupied two rooms in the buildings on the premises; he also kept a liquor store in a part thereof; the other rooms she leased to various tenants, claiming to be owner, and she collected the rents. Her deed was not recorded until after the giving of the mortgage. *Held*, that B.'s actual possession under her deed, although unrecorded, and its existence unknown to the plaintiff, was sufficient notice to him of her rights to defeat any claim under the mortgage. *Id.*
3. Also, *held*, that the fact that B. and her husband occupied the store and a living apartment in the building prior to the time she went in possession under her contract of purchase could not aid the plaintiff. *Id.*

See ADVERSE POSSESSION.

POWERS.

1. The provision of the Revised Statutes (1 R. S. 737, § 124), declaring that "every instrument executed by the grantee of a power, conveying an estate, or creating a charge which such grantee would

have no other right to convey or create, unless by virtue of his power, shall be deemed a valid execution of the power, although such power be not recited or referred to therein," was not intended to change then existing rules; and whenever, in addition to the power, the grantee has an independent interest in the property, whether legal or equitable, the rule of the statute does not apply, and the instrument will not be deemed an execution of the power, but only a conveyance of the independent interest. *M. L. I. Co. v. Shipman.* 324

2. The will of S. devised his real estate to his wife as long as she should remain his widow, and upon her death or remarriage, to their children. He made her executrix, and the will authorized her to make advances from the property, from time to time, in her discretion, to the children "for maintenance and support," and empowered her to mortgage, lease and dispose of such property for the purpose of carrying into effect the provisions of the will. The widow married and subsequently executed a mortgage on said real estate in her individual name to secure a loan. The mortgage contained no reference to the character of the mortgagor as executrix, or to the power to mortgage contained in the will. This mortgage was paid from the proceeds of a loan obtained from plaintiff upon a mortgage of the same property, executed by the widow individually and as executrix. In an action to foreclose the latter mortgage, it appeared that plaintiff had knowledge that the purpose of the mortgagor was to pay the prior loan with the money borrowed; such prior loan was procured for the benefit of the widow's second husband. *Held*, that upon the marriage of the widow the fee of the real estate vested in the children, subject to the execution of the power of sale and to the widow's right of dower; that the interest mortgaged must be restricted to the individual interest which the mortgagor had as doweress; that although her dower right while unassigned did not

give her a legal estate in the land, it was a legal interest and constituted property capable in equity of being sold, transferred and mortgaged by her. *Id.*

PRACTICE.

1. A respondent, in moving to dismiss an appeal on the ground that the time for appealing had expired before service of notice of appeal, stands upon a strict right and must show a strict and technical compliance with the statute on his part to entitle him to the relief sought. *Good v. Daland.* 153
2. Where an alleged copy of judgment served was a true copy except the attestation of the clerk, required by the Code of Civil Procedure (§§ 1236, 1237), which was omitted, *held*, that the paper served was not a complete copy, and the service did not initiate the running of the time limited by appealing. *Id.*
8. Where, on motion to dismiss an appeal in a case in which an interlocutory judgment had been entered on a demurrer, and so to authorize an appeal, the certificate of the court below was required (Code Civ. Pro. § 190, subd. 4), the appellant asked for leave to apply to the court below for the requisite certificate, which application was denied, *held*, that this did not preclude the appellant from thereafter making such application without leave, and on procuring the certificate from again appealing. *Id.*
4. The provision of the Code of Civil Procedure (§ 1778), declaring that, in an action against a corporation "to recover damages for the non-payment of a promissory note, or other evidence of debt for the absolute payment of money upon demand, or at a particular time, * * * unless the defendant serves with a copy of his answer or demurrer, a copy of an order of a judge directing that the issues presented by the pleadings be tried, the plaintiff may take judg-

ment, as in case of default in pleading at the expiration of twenty days" does not apply to an action wherein it is sought to charge a corporation as indorser of a promissory note; it is to be confined strictly to actions upon instruments which admit on their face an existing debt payable absolutely. *Shorer v. T. P. & P. Co.* 483

See APPEAL,
PLEADING.
TRIAL.

PRESUMPTIONS.

1. Where one bank has funds on deposit with another, the law implies a contract between them that the latter shall pay the amount standing to the credit of the former, upon and according to its drafts or order, and a failure so to pay, is a breach of contract, for which the debtor bank is legally liable. *C. N. Bank v. I. & T. N. Bank.* 195
2. In an action to recover damages for the erection, and to compel the removal, of a wharf and bridge alleged to have been unlawfully erected by defendants upon lands of plaintiffs, adjoining and under the waters of Setauket bay, in the town of Brookhaven, Long Island, plaintiffs claimed title to the land above high-water mark as descendants of F., one of the original proprietors of the town, to whom a lot including the upland adjoining the bay was allotted. It appeared that the structures in question extended above high-water mark in front of the F. lot. *Held*, that in the absence of any evidence of a reservation by the town of land above high-water mark, the presumption was that plaintiffs' title extended to that mark; and so far as said structures extended above it, they were entitled to have them removed. *Roe v. Strong.* 316
3. As to the lands under water plaintiffs claimed title under a deed from S. to B., executed in 1768, which purported to convey "a certain piece of salt thatch," the bounds of which as given included the *locus in quo*. It appeared that

plaintiffs and their predecessors in title, so far back as the memory of living witnesses extended, exercised acts of ownership by cutting thatch, leasing the right to cut to others, and in one instance brought suit against an alleged trespasser. It also appeared that, prior to 1693, the town had conveyed to a private person the land under water in the bay up to the line of and excepting that portion included in the deed to B. *Held*, that the evidence justified the presumption of a grant of the soil, and so made out a *prima facie* title in the plaintiffs; and that, therefore, a dismissal of the complaint was error. *Id.*

4. The possession of a deed by the grantee is *prima facie* evidence of delivery, when there is nothing to impeach the *bona fides* of his possession. *Strough v. Wilder.* 530

5. After the writ of certiorari was issued, the assessment-roll having been placed in the hands of the proper officer for collection, the relators paid the taxes imposed upon the property, leaving, however, with the officer a writing, stating that the taxes were paid under protest, for the reason that the assessment was excessive and that for the correction thereof, proceedings were then pending. *Held*, that in the absence of any evidence as to the circumstances under which the payment was made, the presumption was, that the payment was involuntary, and so, did not estop the relators. *People ex rel. v. Carter.* 557

6. Possession of land is always presumed to be in subordination to the true title, and one who claims to have acquired title by adverse possession must show that he or his predecessors in interest held the land in hostility to the true owner claiming the title thereto. *Doherty v. Matsell.* 646

PRINCIPAL AND AGENT.

In an action upon certain promissory notes made payable to defendant, a domestic corporation, and indorsed by L., as its president, it

appeared that the defendant had its main office in the city of New York, and, while a portion of its business was transacted and most of its purchases and sales were made in other states and countries, its principal business operations were carried on in that city, and the annual meetings of its directors were there held. L. was its president and treasurer, the general manager of all its business affairs in said city, and the only officer in attendance at its office there; he paid the current accounts of the company, indorsed checks made payable to its order, the discount of business paper and the use of its money for its purposes, and the account of the same on its cash books were daily and permitted transactions. Defendant had no cash capital, and its working capital was borrowed on the credit of the company; this was done principally by L., and mainly by the use of paper indorsed by him in its name; the evidence tended to show that this was with the knowledge and acquiescence of the directors. *Held*, that the evidence required the submission of the question of the authority of L. to bind defendant by indorsements, to the jury; and that a dismissal of the complaint on trial was error. *F. N. Bank v. N. P. Co.* 256

See BROKERS.
FACTORS.

PRIVATE WAY.

1. H., plaintiff's testator, being the owner of land upon which was a residence built for and used as a gentlemen's country seat, obtained from defendant, by purchase and grant, a right of way from said land to a public highway across the farm of the latter, over a piece of land described. The premises of H. had no other connection with the highway than the way thus granted. The land described in the grant, over which the way was granted, was, at the time, rocky and uneven, not adapted to purposes of cultivation, or for a carriage-way, until prepared for that purpose. H. prepared a road-bed, constructed thereon a

carriage-way, fences were built on both sides, with openings on either side, so that defendant might cross the road. Defendant thereafter used the road-way for carrying heavy loads of farm produce and utensils over it, thus injuring the road, and also placed stones thereon which obstructed the passage, and he threatened to continue such use whenever he deemed necessary. *Held*, that plaintiff was entitled to an injunction to restrain such improper use of the way; that the grant gave plaintiff, not only a right to an unobstructed passage at all times over the land marked out for the way, but also all such rights as were incident or necessary to such passage; that plaintiff thus acquired the right to enter upon the land and construct such road as he desired, and to restrict such use of it by the owner of the servient tenement, as was inconsistent with the full and unrestricted enjoyment of his easement; that the full extent of the rights of the grantor was to enter upon the land and do such acts only as should not injure or impair the usefulness of the road so constructed, or its character as a carriage road for private use; also, that the grantee had a right, not only to a free passage over the traveled part, but also over the whole strip granted and enclosed as a way; and that the deposit of stones or other obstructions on any part of the enclosure, in such a way as to interrupt the enjoyment of the easement, was inconsistent with and an infringement upon the grantee's rights, and could properly be prevented by injunction. *Herman v. Roberts*.

37

2. But *held*, defendant was not precluded from the use of the road-way, by passing over or across it in such a manner as not materially to obstruct passage or injure the road-bed. *Id.*

3. In considering the extent of the rights of the respective parties in the grant of a right of way, it is not proper to refer to the parol negotiations which preceded or accompanied its execution, but

the language of the grant should be regarded, and, when that is uncertain or ambiguous, the circumstances surrounding it, and the situation of the parties, with a view of arriving at the true intent of the parties. *Id.*

PRIVILEGED COMMUNICATIONS.

Upon trial of a criminal action, physicians who have been sent to the jail by the district attorney to make an examination of the prisoner were permitted to testify, as witnesses for the prosecution, to his mental condition, under the objection that either the relation of patient and physician existed, or else the prisoner was compelled to furnish evidence against himself. *Held*, no error; no evidence having been called for as to the prisoner's statements or as to transactions in the jail. *People v. Kemmler*. 580

PUNISHMENT.

1. The provisions of the Code of Criminal Procedure (§§ 491, 492, 503, 504, 505, 506, 507, 508 and 509, as amended by chap. 489, Laws of 1888) changing the mode of inflicting the death penalty, do not upon their face, nor in their general purpose and intent, violate any provision of the Constitution. *People ex rel. v. Durston*. 569

2. *It seems*, that under the provision of the state Constitution (Art. 1, § 5) forbidding the infliction of cruel and unusual punishments, the courts have power to declare void any legislative acts prescribing punishment for crime in fact cruel and unusual. *Id.*

3. The legislature, however, has power to change the manner of inflicting the death penalty; this is not a change of punishment, but simply of the mode. *Id.*

4. Whether the use of electricity as an agency for producing death constituted a more humane method of execution than that formally used was a question for the legislature, and its determination in regard thereto is conclusive. *Id.*

QUESTIONS OF LAW AND FACT.

—When question of negligence one of fact.

See *Weil v. D. D., E. B. & B. R. Co.* 147

See *Ouderkirk v. C. N. Bank.* 263

—When question of negligence one of law.

See *Dobbins v. Brown.* 188

See *Larkin v. O'Neill.* 221

See *Danaher v. City of Brooklyn.* 241

—When question as to authority of officer of corporation to indorse and transfer notes made payable to it one of fact.

See *F. N. Bank v. N. P. Co.* 250

—When question as to waiver of conditions on policy of life insurance one of fact for jury.

See *Wyman v. P. M. L. Ins. Co.* 274

—When question as to whether a transaction amounted to a bailment or sale one of fact for jury.

See *Crosby v. President, etc., D. & H. C. Co.* 334

—When the evidence in proceedings against an officer of the police force of New York city, charged with "conduct unbecoming an officer," fails to show any breach of discipline or conduct unbecoming an officer, the case presents a question of law reviewable by the General Term on certiorari, and also reviewable here.

See *People ex rel. v. French.* 493

RAILROAD CORPORATIONS.

1. Under the provision of the General Railroad Act of 1850 (§ 13, chap. 140, Laws of 1850), which authorizes a corporation organized under it to obtain, by condemnation, such lands as are "required for the purposes of its incorporation," only such and so much land may be condemned as the proper execution of the corporate purposes shall require and render necessary. *In re S. B. R. R. Co.* 141

2. Under the provision of the Street Railroad Act of 1884 (§ 3, chap.

252, Laws of 1884), giving to a corporation organized under it the right to construct its road "through, along and upon any private property which said company may require for the purpose," and giving it the powers and privileges granted to corporations organized under the General Railroad Act, conceding that a street railroad corporation has power to condemn lands of a private owner in some cases and for some purposes, as to which *quære*, the purposes are those, and those only, which the law of its organization describes and defines, and which are certified to in its articles of association; those purposes are limited to the construction of a street surface railroad.

Id.

3. Where, therefore, the articles of association of a corporation organized under the Street Railroad Act, stated its purpose to be to construct and operate a street surface railroad through certain specified avenues in the village of E., and the corporation subsequently filed a map of its intended route, which was not along the specified streets, but was located upon private property outside of the streets for nearly the whole distance, *held*, the corporation had no right to condemn the lands upon which the proposed route was located, as they were not required for the purposes of its incorporation; that while a right to change the specified route might exist, this did not authorize a change which involved not only a contradiction and violation of the articles of association, but also of the character and quality of the corporation. *Id.*

4. In an action to recover damages for injuries alleged to have been caused by defendant's negligence, plaintiff's evidence was to this effect: Plaintiff, a child two years of age, lived with her parents on the first floor of a building fronting on a street twenty-six feet wide from curb to curb, through which defendant's road runs; her father carried on the bakery business on the same floor. Plaintiff was with her father in the store,

the door of which, on account of the heat, was left open. She went behind the counter, and while he supposed she still remained there she escaped into the street and was run over by one of defendant's cars. She had been out of her father's sight not more than two minutes. Plaintiff was nonsuited on the ground that her parents were negligent in omitting to exercise a proper degree of care and watchfulness. *Held*, error; that the question was one of fact for the jury. *Weil v. D. D., E. B. & B. R. R. Co.* 147

5. A railroad corporation, for the safety of its passengers as well as its employes, is bound to use suitable care and skill in furnishing not only adequate engines and cars, but also a safe and proper track and road-bed. The track must be properly laid, the road-bed properly constructed, and reasonable prudence and care exercised in keeping the track free from obstructions, animate and inanimate, and if, from want of proper care, such obstructions are permitted to be, or to come upon the track, and a train is thereby wrecked, the corporation is responsible for injuries received by any person thereon, whether passenger or employe. *Donnegan v. Erhardt.* 468

6. In an action to recover damages for injuries received by plaintiff, who was a brakeman in the employ of defendant, it appeared that the injuries were caused by a collision in the night-time between the train upon which plaintiff was employed and a horse which plaintiff claimed came upon the track through defendant's negligence in permitting the fence along its road to become out of repair. The case was submitted to the jury, with instructions that if the horse came upon the track through a fence which defendant was bound to maintain and keep in repair, and which was negligently permitted to be out of repair, plaintiff could recover. *Held*, no error. *Id.*

7. Under the provisions of the General Railroad Act (§ 44, chap.

140, Laws of 1850), requiring railroad corporations to build and keep in repair fences on the sides of their roads, and providing that they "shall be liable for damages which shall be done * * * to any cattle, horses, sheep or hogs thereon," an absolute duty is imposed upon said corporations to fence their tracks, not simply to protect the lives of animals, but also to protect persons upon their trains, and for violation of said statutory duty, causing injury, such a corporation is liable. *Id.*

8. *It seems* that, independent of the statute, a jury may find that it is the duty of a railroad company to fence its track to guard against such dangers. *Id.*

9. In an action against a railroad corporation to recover damages because of its interfering with plaintiff's rights in a street adjoining his premises, plaintiff is not entitled to a recovery for permanent diminution in value of the premises; but only damages sustained prior to the commencement of the action. *Ottenot v. N. Y., L. & W. R. Co.* 603

— *As to sufficiency of evidence of plaintiff's title in action against a railroad corporation to recover damages for alleged unlawful construction and operation of road in street in front of plaintiff's premises.*
See Dean v. M. E. R. Co. 540

REAL PROPERTY.

1. Oil in the earth belongs to the owner of the land, and when unlawfully taken therefrom by a wrong doer the title of such owner remains perfect, and he may pursue and reclaim the property wherever he may find it. *Hughes v. U. P. Lines.* 423

2. Actual possession of real estate is sufficient notice to all the world of the existence of any right which the person in possession is able to establish. *Phelan v. Brady.* 587

3. Possession of land is always presumed to be in subordination to the true title, and one who claims

to have acquired title by adverse possession must show that he or his predecessors in interest held the land in hostility to the true owner claiming the title thereto. *Doherty v. Mastell.* 646

RECEIVER.

1. In 1887 plaintiff, with other corporations engaged in the manufacturing of carbon, entered into a contract with H., the object of which was, by a combination, to vest in H., as a common trustee, the management and control of the business of manufacturing and selling their products. The several companies agreed to lease to such trustee their respective factories, and operate them under his direction. He was to designate the kind of goods to be manufactured, fix the prices at which and the persons to whom they should be sold, and, after paying expenses, divide the net proceeds and profits as provided in the contract. When this contract was made plaintiff had an outstanding contract to furnish carbons to the B. E. L. Co. from time to time. Plaintiff assigned to H., as such trustee, all existing contracts, and he assumed their performance. Carbons manufactured at plaintiff's factory in April, May and June, 1887, were billed in the name of H., and delivered under said contract to the B. E. L. Co. About July, 1887, plaintiff refused to continue in the combination, and an action was commenced against the trustee and the contracting corporations to dissolve the same, which resulted in the appointment of defendant as receiver of its property. In an action brought by plaintiff to recover for said carbons, the B. E. L. Co. paid the amount into court. The court found that the contract to combine was made for unlawful purposes, and was illegal; that the trust was then insolvent, and its assets including the claim against the B. E. L. Co. insufficient to pay its creditors. *Held*, that, as between the plaintiff and the receiver the latter was entitled to the fund; that plaintiff stood in

the position of a party to an illegal contract claiming a fund, which, if the contract was valid, belonged to the trust combination, and to sustain the action would permit it to escape from the operation of the rule which denies affirmative relief to a party to an illegal contract. *P. C. Co. v. Mc-Millin.* 46

2. As to whether, if the B. E. L. Co. had not paid the funds into court, plaintiff could have enforced a recovery against it, although there was no adverse claimant, *quære.* *Id.*

3. A receiver of an insolvent corporation unites in himself, not only the rights of the corporation, but those of creditors; he may in the interest of creditors, assert a claim which he might be unable to do as a representative solely of the corporation, and he may disaffirm dealings of the corporation in fraud of the creditor's rights. *Id.*

4. Certain creditors of a corporation, whose claims against it were valid and past due, and against which there was no defense, knowing the corporation to be insolvent, and for the purpose of obtaining a preference over other creditors, commenced action against it, the summons being served upon D., one of its directors, under an arrangement with him that he would not disclose the service to the other officers; he carried out the agreement and suffered said creditors to obtain judgment by default. The corporation had no real estate and its personal property was levied upon and sold under execution issued on said judgments. In an action brought by a receiver of the corporation, appointed subsequent to the levy, to have the judgments declared void and set aside, *held*, that the arrangement did not constitute an assignment or transfer; that there was no violation of said statute; and that the action was not maintainable. *Varnum v. Hart.* 101

5. Also *held*, that as the sheriff had seized upon the property and had it in his possession at the time of the appointment of the receiver

the sale was not absolutely void, but at most could be held to be simply irregular. *Id.*

6. A court of original jurisdiction has not power, before judgment in an action in which a receiver *pendente lite* had been appointed on the application of the plaintiff, to make an order continuing the receivership, after judgment shall have been rendered, during the pendency of any appeal which may be taken therefrom. *Colwell v. G. N. Bank.* 408

7. In cases where the provisions of the Code of Civil Procedure, in reference to the appointment of receivers (§ 713) are applicable, and they furnish an adequate remedy, the power of the court is limited by that section, and it must proceed in the manner therein provided, otherwise its orders will be void. *Id.*

8. *It seems* the court may appoint a receiver after judgment, and pending an appeal, although the judgment denies relief to the plaintiff; but the Code contemplates that such application will be made upon the whole case, including the adverse judgment, and does not permit the order to be made in anticipation of the judgment. *Id.*

9. Accordingly *held*, where after trial and a decision adverse to plaintiff in an action in which a receiver *pendente lite* had been appointed, but before judgment, an order was granted continuing the receivership until after the decision of any appeal from the judgment, that the receiver had no authority after the entry of judgment to bring an action to recover a claim, a part of the assets in his hands as receiver; and where the facts appeared in the complaint in such an action, that it was a good ground for a demurrer. *Id.*

RECORDING ACT.

In an action brought to foreclose a mortgage upon certain premises given by M., who held an apparently perfect record title to the same, it appeared that before the

execution of the mortgage, M. conveyed the premises to B. who was in possession, and, with her husband, occupied two rooms in the buildings on the premises; he also kept a liquor store in a part thereof; the other rooms she leased to various tenants, claiming to be the owner, and she collected the rents. Her deed was not recorded until after the giving of the mortgage. *Held*, that B.'s actual possession under her deed, although unrecorded, and its existence unknown to the plaintiff, was sufficient notice to him of her rights to defeat any claim under the mortgage. *Phelan v. Brady.* 587

RECOVERY OF POSSESSION OF PERSONAL PROPERTY.

1. In an action to recover the possession of personal property, when the defendant gives an undertaking for the return of the property, admitting therein that plaintiff has taken the property described in his affidavit and requisition from defendant's possession, he is estopped from denying that he had possession of the property, or any part thereof, at the commencement of the action, or from showing that it was different or other property; he is concluded by the recitals in the undertaking. *Martin v. Gilbert.* 298

2. The effect of the recital, as an estoppel, is not taken away by the fact that after the return of the property to the defendant, he serves an answer, denying that he ever had possession of the property mentioned in the complaint or affidavit accompanying the requisition; nor is its effect disturbed by the provision of the Code of Civil Procedure (§ 1704), giving defendant a right to a return of the property replevied, on giving a bond, although it be not the property described in the requisition. *Id.*

3. *It seems*, where the property replevied is not that described, it is not necessary or proper to recite in the bond that it is. *Id.*

4. In such an action, as plaintiff's affidavit, requisition and the re-

turn of the officer are made by the Code of Civil Procedure (§ 1717) part of the judgment-roll and a copy of them is required to be furnished to the court or referee on trial, it is not necessary to put them formally in evidence in order that the court may consider them.

Id.

REDEMPTION.

1. In an action brought by plaintiff, as receiver of the P. H. S. & I. Co., the complaint alleged in substance that said company executed to defendants' firm, chattel mortgages on all its property, consisting of buildings, machinery, tools, etc.; that default having been made in payment, defendants took possession of the property and sold it at auction, they bidding it in for \$1,000; that none of the property was in view of the persons attending the sale; that it was all put up in a lump and sold together at the request of defendants, although they knew it could be sold in parcels, and greater sums realized for it if so sold; that none of the company's officers were present; that since the sale defendants have claimed to own the property and have sold \$10,000 or \$15,000 of it; that at the time of the sale the property was worth about \$60,000, and the company's indebtedness to defendants did not exceed \$20,000. The relief asked was that defendants be required to account for the value of the property, and after application of sufficient to extinguish the debt secured that plaintiffs have judgment for the balance. A demurrer to the complaint was sustained because of the omission of an averment of a tender to defendants of the amount conceded to be due and unpaid on the mortgages, or an offer to pay that amount on its being ascertained. *Held*, error; that the sale to defendants was voidable and could be vacated and set aside as part of the relief in this action; that the amount received by defendants on the sales made by them was applicable and must be deemed to have been applied upon the mortgages, and the property remaining in their hands to be held as security for the balance

due; that a tender before suit, or an offer in the complaint to pay was not necessary and the omission thereof was only important as bearing upon the question of costs; that the facts alleged in the complaint were sufficient to show a right of redemption in plaintiff and the action should be treated as one to redeem and for such incidental relief as is necessary to accomplish the redemption. *Cas-serly v. Witherbee*. 522

2. *It seems* that in such an action payment of the amount found due should be required by the judgment, upon and as a condition of redemption, and that a dismissal of the complaint on default of payment under the judgment would operate as a foreclosure. *Id.*

REFERENCE.

1. Where upon trial before a referee, evidence is received and a question of fact is litigated, without any objection that the fact is admitted and the evidence is inadmissible under the pleadings, the referee is justified in refusing to find in accordance with the alleged admissions, and in determining the question upon the evidence. *Mandecille v. Newton*. 10
2. Although a referee, in his report, places a finding of fact among his conclusions of law, this does not deprive it of its force. *In re Clark*. 427
3. In proceedings under the provisions of the Code of Civil Procedure (§ 2606), giving the surrogate jurisdiction upon the death of an executor to require his executor or administrator to account for and deliver over the trust estate, the referee to whom the matter was referred by the surrogate found as facts that a large amount of money belonging to the estate was received by C., the deceased executor, beyond the sums acknowledged in the account presented by his executrix, specifying various items, including one of \$15,000, received by C. within three months of his death, and "deposited by him in his own

private bank account," and that "there was no evidence of the disposition of said funds" by him, with certain specified exceptions; also, that the accounting executrix, although in possession of C.'s bank and check-books, refused to produce them. As conclusions of law, the referee found that there being no evidence of the disposition of said funds by C., they are presumed to have come into the possession of his executrix; and that said presumption was strengthened by the deposit by C. to his private account, and the refusal of his executrix to produce such book, and that a decree should be entered against her individually and as executrix for the sums due. Upon the hearing before the surrogate he modified the finding that the moneys received by C. were deposited by him in his own private account, by substituting a finding that the moneys were deposited to his own individual credit and he sustained exceptions to the conclusions of law, so found, as to the presumption that the fund came into the possession of the executrix, and to the direction of judgment against her individually, and he awarded judgment against her as executrix simply; the report in all other respects was confirmed. The General Term affirmed the decree on the ground—mainly that there was no finding by the referee that the fund belonging to the estate received by C. passed into the hands of his executrix. *Held*, error; that the finding as to the presumptions were of fact, not of law, and amounted to a finding that the fund which C. received passed on his death into the actual possession of the executrix; and that the conclusion as to her individual liability followed as a conclusion of law. *Id.*

4. In a proceeding by reference to ascertain the damages sustained by a party in consequence of an injunction restraining him from exercising some legal right, it is proper to allow as part of the damages the expenses incurred upon the reference. *Holcomb v. Rice.* 598

5. The allowance of costs, upon a

reference under a statute of a disputed claim against an estate, is within the discretion of the court below, and is not reviewable here. *Hauxhurst v. Ritch.* 821

RELEASE.

—When contractor, upon receiving final payment under his contract, executes release of all causes of action, damages, etc., this is a good defense to any claim for damages arising under contract.

See Phelan v. Mayor, etc. 86

REMEDIES.

When an error has been made in the form of a judgment, by which its scope has been enlarged or its amount increased beyond that plainly authorized by a verdict, referee's report or decision of the court, the judgment is not void or inoperative, and no question is presented for the consideration of the court on appeal; the error is an irregularity merely, which must be corrected, if at all, by motion in the court of original jurisdiction, to be made within one year after notice of the judgment or filing of the judgment-roll. (Code Civ. Pro. §§ 724, 1282.) *C. E. Bank v. Blye.* 414

REPLEVIN.

See RECOVERY OF POSSESSION OF PERSONAL PROPERTY.

RESCISSION.

Where a contract is rescinded while in course of performance, no claim in respect of performance, or of what has been paid or received thereon may thereafter be made, unless expressly or impliedly reserved upon the rescission. *McCreery v. Day.* 1

RIOTS.

In an action, under the act of 1855 (Chap. 428, Laws of 1855), to recover compensation for property destroyed in consequence of a mob

or riot, it appeared that an action was begun in the County Court for the same cause within the three months limited by said act, in which the complaint was dismissed for want of jurisdiction in that court to entertain actions brought to recover a sum exceeding \$1,000; thereafter, this action was commenced, but after the lapse of the statutory period. *Held*, that the action was not maintainable; that as it was brought under special law and was maintainable solely by its authority, the limitation was so incorporated with the remedy given as to make it an integral part of it and was a condition precedent to the maintenance of the action at all; and that the provisions of the Code of Civil Procedure (§ 405) providing that when an action is commenced within the time limited and is terminated "in any other manner than by voluntary discontinuance, dismissal for neglect to proceed, or a final judgment on the merits, the plaintiff may commence a new action for the same cause within one year after" such determination, did not apply. (See § 414.) *Hill v. Suprs. Rens. Co.* 344

SALARY.

— *Of county treasurer of Erie county, how fixed.*
See Suprs. Erie Co. v. Jones. 339

SALES.

In an action to recover damages for the alleged conversion of a quantity of lumber, which had been transferred to plaintiff by the firm of G. & E. H., it appeared that said firm, having contracted to build two boats for defendant, ordered lumber of it; the order specified kinds and quantities, but no prices; the lumber was forthwith delivered, accompanied by a bill, in which the firm was described as debtors to defendant for the lumber, and the quantity, kind and price were set forth. Defendant was not required by the contract to furnish any lumber, nor were the contractors required to purchase any from it. It did not

appear there were any negotiations between the parties prior to the delivery of the lumber as to the terms and conditions on which the lumber was to be furnished. Defendant proved that it kept on hand lumber for building boats, including pieces specially shaped, which is used for that purpose, and also furnished to builders having contracts with it, but only to be used in boats built for it, and that the value of the lumber so furnished was deducted from the price of the boat in which it was used, which custom was known to G. & E. H. At the close of the evidence a motion by defendant's counsel for a nonsuit was granted. *Held*, error; that the question whether there was a bailment or a sale was for the jury. *Crosby v. Pres., etc., D. & H. C. Co.* 334

SERVICE AND PROOF OF.

Plaintiff in 1836 joined with her husband in a mortgage upon his land. In 1838 they were both made parties to a suit for the foreclosure of the mortgage. No copy of the writ of subpoena was served upon her; one was served upon the husband, and one delivered to him with the request to hand it to her; she was at the time under age. A judgment of foreclosure and sale was entered, under which the premises were sold. The husband died in 1882. In an action to recover dower, *held*, that under the rule and practice in chancery proceedings in force at the time of the foreclosure, personal service of the writ upon plaintiff was not necessary, but service on the husband was a good service on both, and this was so although she was at the time under age; and that, therefore, the action was not maintainable. *Feitner v. Lewis.* 131

SET-OFF.

1. In an action to foreclose a mortgage held by plaintiffs, as assignees for the benefit of creditors of the mortgagees, defendant M., who had purchased the premises subject to the mortgage.

sought to set off a claim against plaintiffs' assignors. It appeared that at the time of the assignment to plaintiffs, the debt secured by the mortgage was not due; that the assignors were insolvent and M. endeavored to have his debt, which was due, applied by them upon the mortgage before it was assigned. *Held*, that he was equitably entitled to the set-off; that it was not necessary that the mortgage debt should have been due, as by seeking to have the debt due him applied thereon, M. had treated it as due and so waived any defense he might have based upon the fact that it was not due; that he had a right so to do and to require the set-off. *Richards v. LaTourette*. 54

2. The distinction between this case and one where the debt owing by the insolvent to the party desiring to avail himself of the set-off is not due, pointed out. *Id.*
3. A certificate of deposit issued by the assignors, who were bankers, was part of the amount M. sought to have offset against the mortgage; this had never been presented and a demand made for its payment at the banking-house of the assignors. *Held*, that a technical demand was not necessary in a case like this, where the set-off is claimed not as a matter of law, but of equity; that the claim of set-off may be regarded as a demand, and should have relation to the time the assignment to plaintiffs was made, so far as to give form and life to the claim that the debt of the insolvents was then due. *Id.*
4. It also appeared that M., after the assignment, recovered a judgment against the assignors for the amount of his debt, whereon an execution was returned unsatisfied. *Held*, that M. did not thereby lose his right of set-off. *Id.*

SHERIFF.

A constable or sheriff in executing a certificate of a judgment of conviction issued to him as prescribed by the Code of Criminal Proceed-

ure (§§ 721, 725) is engaged in a criminal proceeding within the meaning of the act, "to reduce the number of town officers and town and county expenses," etc. (Chap. 180, Laws of 1845, as amended by chap. 455, Laws of 1847), and the fees and expenses of the officer are included in the provisions of said act (§ 26, as amended), charging the expenses of certain criminal proceedings under the grade of felony upon the town or city where the offense was committed. *People ex rel v. Supra. West. Co.* 126

SPECIFIC PERFORMANCE.

1. In an action for specific performance of a contract for the sale of land, it appeared that the contract was executed by defendants F. and R., in whom was the title. Their wives were also made defendants. They all joined in the answer, which recites, "defendants further admit that they did promise to convey the said premises to the plaintiff," and the only issue tendered therein or litigated was that the contract in suit was induced by the fraudulent representations of plaintiff. There was no allegation that the wives were not parties to the contract, or were not bound thereby. The issue of fraud was decided against the defendants, and the judgment required their wives to join with their husbands in the conveyance directed. The defendants jointly excepted to the findings of facts and law, but none of the exceptions were directed toward said provision of the judgment. The General Term reversed that part of the judgment on the ground that the wives were not parties to the contract. *Held*, that as there was no special exception pointing out the objection, the reversal by the General Term was error. *Schoonmaker v. Bonnie*. 565
2. *It seems* that had the objection been raised on the trial, and presented by a proper exception, it would have been valid. *Id.*
3. As to whether the court has power to specifically enforce a contract

by a married woman to release her dower interest, made upon a consideration passing to her husband, when they were residents of, and the contract was made in another state, in which the common-law disabilities of married women still exists *quære*. *Id.*

STATUTES.

1. Where provisions of a statute are separate, and one is unconstitutional, while the others are valid, the latter will be sustained and the former only rejected. *Lawton v. Steele*. 226

2. Statutes changing the common law are to be strictly construed, and it will be held to be no further abrogated than the clear import of the language used in the statutes absolutely requires. *Dean v. M. E. R. Co.* 540

— Chap. 313, *Laws of 1874*.
See In re Rosenbaum, 24.
 — 1 R. S. 388.
 — Chap. 282, *Laws of 1852*.
 — § 827, chap. 410, *Laws of 1882*.
See Church of St. Monica v. Mayor, etc., 91.
 — 1 R. S. 608, § 4.
See Varnum v. Hart, 101.
 — § 12, chap. 40, *Laws of 1848*.
See Carr v. Rischer, 117.
 — Chap. 180, *Laws of 1845*.
 — § 26, chap. 455, *Laws of 1847*.
See People ex rel. v. Suprs. West. Co. 126.
 — Chap. 392, *Laws of 1883*.
See People ex rel. v. Coleman, 137.
 — § 13, chap. 140, *Laws of 1850*.
 — § 3, chap. 252, *Laws of 1884*.
See In re S. B. R. R. Co., 141.
 — § 80, tit. 22, chap. 583, *Laws of 1888*.
See Harrigan v. City of Brooklyn, 156.
 — Tit. 3, art. 4, § 28, chap. 130, *Laws of 1842*.
See People ex rel. v. Bell, 175.
 — Chap. 205, *Laws of 1887*.
See W. I. B. Co. v. Town of Attica, 204.
 — Chap. 907, *Laws of 1869*.
 — Chap. 283, *Laws of 1871*.
See Strough v. Suprs. Jeff. Co. 212.
 — § 2, chap. 317, *Laws of 1883*.
 — Chap. 141, *Laws of 1886*.
See Lawton v. Steele, 226.

— 1 R. S. 737, § 124.
See M. L. Ins. Co. v. Shipman, 324.
 — Chap. 436, *Laws of 1877*.
 — Chap. 233, *Laws of 1880*.
 — Chap. 557, *Laws of 1881*.
See Suprs. Erie Co. v. Jones, 339.
 — Chap. 428, *Laws of 1855*.
See Hill v. Suprs. Rens. Co. 344.
 — Chap. 179, *Laws of 1830*.
See Soltan v. Gerdau, 380.
 — § 37, chap. 611, *Laws of 1875*.
See Cochran v. Wiechers, 399.
 — 1 R. S. 741, §§ 13, 14.
See Akin v. Kellogg, 441.
 — § 1, chap. 341, *Laws of 1876*.
 — Chap. 321, *Laws of 1877*.
See Barter v. B. L. Ins. Co., 450.
 — 2 R. S. 137, § 4.
See Bulger v. Rosa, 459.
 — § 44, chap. 140, *Laws of 1850*.
See Donnegan v. Erhardt, 468.
 — Chap. 257, *Laws of 1886*.
See In re Roe, 509.
 — Title 10, § 10, title 18, §§ 4, 5, 36, chap. 863, *Laws of 1873*.
See People ex rel. v. Wilson, 515.
 — 1 R. S. 738, § 137.
See Strough v. Wilder, 530.
 — Chap. 537, *Laws of 1887*.
See Dean v. M. E. R. Co., 540.
 — Chap. 269, *Laws of 1880*.
See People ex rel. v. Carter, 557, 654.
 — Chap. 489, *Laws of 1888*.
See People ex rel. v. Durston, 569.

STATUTE OF FRAUDS.

1. The written memorandum of a contract required by the Statute of Frauds must contain, within itself or by reference to other writings, all the essential elements of a contract, and when it comes up to these requirements, neither party will be permitted to show that the contract was other or different than that stated. *Routledge v. Worthington Co.* 592

2. If, however, the writing is insufficient, but there has been such a performance as to take the case out of the operation of the statute, oral evidence is admissible to supply omissions and to establish what were the contractual relations of the parties. *Id.*

3. In an action to recover for certain publications sold by plaintiff to

defendant, plaintiff produced in evidence an agreement signed by defendant by which it agreed to take the publications at a price specified, amounting to \$4,000. It appeared that after the parties had come to an agreement in regard to the sale, defendant at plaintiff's request for a formal order executed the writing. Defendant set up as a counter-claim, and offered to prove by oral evidence that plaintiff agreed in consideration of the purchase, and as part of the agreement, that the trade-price at which they sold the publication should not be lowered, and claimed damages for breach of that agreement. The testimony was rejected. *Held*, error; that the writing represented a part only of the contract, that is defendant's undertaking, while that of plaintiffs rested simply in parol; that there was in fact no valid contract between the parties; but as it had been executed, this took the agreement out of the Statute of Frauds, and left the parties subject to and bound by the terms of the actual agreement made. *Id.*

STOCKHOLDERS.

Under the provision of the act of 1875, providing for the organization of certain business corporations (§ 37, chap. 611, Laws of 1875), which makes the stockholders "in limited liability companies" individually liable "to an amount equal to the amount of stock held by them respectively" for all the debts of the company, until the whole amount of capital stock has been paid in and a certificate thereof made and recorded, the liability so imposed is not penal, but is in the nature of a contract obligation, and so it survives the death of a stockholder, and continues against his personal representatives. The statutory obligation which the stockholder assumes when he becomes such, is inherent in, and becomes part of every contract made by the corporation with the creditors prior to the time that the certificate required is filed. *Cochran v. Wiechers.* 399

STREETS.

In an action against a railroad corporation to recover damages because of its interfering with plaintiff's rights in a street adjoining his premises, plaintiff is not entitled to a recovery for permanent diminution in value of the premises; but only damages sustained prior to the commencement of the action. *Ottenot v. N. Y., L. & W. R. Co.* 608

SUPERVISORS.

— *When action properly brought for benefit of a town by its supervisor in his name as such officer.*
See *Strough v. Supra. Jeff. Co.* 212

SURROGATE'S COURT.

1. To the extent that a surrogate is given jurisdiction in the administration of the estates of deceased persons, he acts judicially; and while his judicial acts are controlled by the limitations imposed by statute, where in a matter within his peculiar jurisdiction it is claimed that he is divested of all discretion, to justify that conclusion the language of the statute must be incapable of any other interpretation. *In re Wagner.* 28
2. The provisions of the Code of Civil Procedure (§§ 2715, 2726, 2727), authorizing a "person interested in the estate" to apply to the surrogate for an order to compel an executor to file an inventory or to account, and requiring the surrogate, in case he is satisfied that the executor is in default in filing a sufficient inventory, to make an order requiring him so to do, or in case he fails "to show good cause to the contrary" to require him to account, and the provision (§ 2514, sub. 11) that where a person interested applies, "an allegation of his interest duly verified suffices, although his interest is disputed," do not make it compulsory upon the surrogate to grant the petition, simply because the petitioner swears that he is interested. *Id.*

3. The said provisions do not deprive the surrogate of the discretion and power to pass upon the right of the petitioner to demand the relief sought, and the executor may show, in opposition to the application, that the estate has been settled, and that all the beneficiaries named in the will have received their share and released the executor from all claims; and this being shown, it is the duty of the surrogate to deny the application. *Id.*

4. As to the filing of an inventory, the executor is not, in the eye of the law, "in default" or a "delinquent," and as to the accounting, he does not fail "to show good cause to the contrary" when it appears that the estate has been accounted for and distributed among those entitled thereto; and this, although the accounting and distribution were made out of court. *Id.*

5. *It seems*, where it appears in answer to such an application, that the right of the petitioner has been satisfied and extinguished or barred by a release, and the *factum* of the settlement or release is put in issue by his reply, or it is questioned on the ground of fraud, the surrogate has no jurisdiction to try the issue, and should dismiss the petition, remitting the applicant to his proceeding in a court having general equity powers to try it. *Id.*

6. In proceedings under the provisions of the Code of Civil Procedure (§ 2606), giving the surrogate jurisdiction upon the death of an executor to require his executor or administrator to account for and deliver over the trust estate, such representative stands in place of the decedent for the purpose of the accounting, and the surrogate's power is precisely the same as if the letters of the deceased executor had been revoked in his lifetime, and he had been called upon to deliver up the assets. *In re Clark.* 427

7. In such a proceeding, the referee to whom the matter was referred by the surrogate found as facts that a large amount of money be-

longing to the estate was received by C., the deceased executor, beyond the sums acknowledged in the account presented by his executrix, specifying various items, including one of \$15,000 received by C. within three months of his death, and "deposited by him in his own private bank account," and that "there was no evidence of the disposition of said funds" by him, with certain specified exceptions; also, that the accounting executrix, although in possession of C.'s bank and check-books, refused to produce them. As conclusions of law, the referee found that there being no evidence of the disposition of said funds by C., they are presumed to have come into the possession of his executrix; and that said presumption was strengthened by the deposit by C. to his private account, and the refusal of his executrix to produce such book, and that a decree should be entered against her individually and as executrix for the sums due. Upon the hearing before the surrogate he modified the finding that the moneys received by C. were deposited by him in his own private account, by substituting a finding that the moneys were deposited to his own individual credit, and he sustained exceptions to the conclusions of law, so found, as to the presumption that the fund came into the possession of the executrix, and to the direction of judgment against her individually, and he awarded judgment against her as executrix simply; the report in all other respects was confirmed. The General Term affirmed the decree on the ground mainly that there was no finding by the referee that the fund belonging to the estate received by C. passed into the hands of his executrix. *Held*, error; that the finding as to the presumptions were of fact, not of law, and amounted to a finding that the fund which C. received passed on his death into the actual possession of the executrix; and that the conclusion as to her individual liability followed as a conclusion of law. *Id.*

8. Where the probate of a will was contested upon the ground that

the instrument was fabricated after the death of the testator by O., one of the witnesses thereto, and the proof on the part of the contestants consisted mainly of acts and declarations of O., who had died prior to the trial, tending to show that the testator died intestate, and that O. fabricated the instrument, *held*, it was competent to prove declarations of O., during the life of testator, to the effect that he had made a will. *In re Hesdra.* 615

9. *It seems* that declarations of a deceased subscribing witness to a will are competent to impeach its execution so far as his signature thereto is concerned; they have no other effect however, than to impair the force of his signature as evidence of the performance of the conditions stated in the attesting clause. *Id.*

10. Where, therefore, evidence is given sufficient to sustain a finding that the signatures to a will are genuine, the surrogate is not required to refuse probate by proof of declarations on the part of a deceased subscribing witness to the effect that he fabricated the will. *Id.*

11. Under the provisions of the Code of Civil Procedure (§ 2606), conferring upon the Surrogate's Court jurisdiction on the death of a guardian, executor or administrator, to require his executor or administrator to account for and deliver over the trust estate the same as it would have against the decedent, if his letters had been revoked in his life-time, his representative, as soon as appointed, stands in his place for the purpose of such accounting and delivery, and the application therefor may be made immediately upon such appointment. *In re Wiley.* 642

TAXATION.

See ASSESSMENT AND TAXATION.

TENDER.

1. Under the provisions of the "act to regulate the forfeiture of life

insurance policies" (§ 1, chap. 341, Laws of 1876, as amended by chap. 321, Laws of 1877), which declares that no life insurance company shall have power to declare a policy thereafter issued or renewed by it, forfeited by reason of non-payment of premium, except upon service of a notice upon the assured as prescribed, and a failure to pay within thirty days after such service, the duration and validity of a policy, whatever may be its terms, is not dependent upon payment of premium on the day named, but upon payment within thirty days after notice given; and where, because of failure to give notice, a policy is in force at the time of the death of the insured, it is not necessary to pay, or tender before suit brought, the premium due and unpaid; the unpaid premium with interest being simply a claim to be deducted by defendant from the sum due upon the policy. *Barter v. B. L. Ins. Co.* 450

2. Under the provisions of the Code of Civil Procedure in reference to tender (§ 731) and payment into court of the money tendered, in case of refusal to accept (§ 732), when the money is so brought into court, it belongs to plaintiff, and his title thereto cannot be disputed, whatever may be the result of the action. *Taylor v. B. E. R. Co.* 561

3. The plaintiff, in proceeding after a tender and deposit, simply runs the risk of paying defendant's costs, if the recovery falls short of the amount tendered, while the defendant takes the risk of losing the amount tendered, in the event of his succeeding in the action. *Id.*

—Where mortgagee has obtained possession through illegal sale under foreclosure of a chattel mortgage, no tender of amount due on mortgage is necessary before bringing suit to redeem.

See *Casserly v. Witherbee.* 522

TITLE.

1. Oil in the earth belongs to the owner of the land, and when un-

- lawfully taken therefrom by a wrong doer the title of such owner remains perfect, and he may pursue and reclaim the property wherever he may find it. *Hughes v. U. P. Lines.* 423
2. In an action for partition, plaintiff claimed title, under deeds, from the heirs of S. W., who died intestate. The defendant G. W., a son of the deceased, claimed under a deed from her, which was neither acknowledged nor its execution attested by a subscribing witness; its execution was proved by two witnesses who were present at the time, and no attempt was made to show that her signature thereto was not genuine. The fact of delivery was not directly proved, but defendant produced the deed and proved that it was drawn by a scrivener, pursuant to the directions of the grantor. Two witnesses testified to declarations of S. W., to the effect that she intended G. W. to have the premises described in the deed, and, that from the time of its execution until S. W.'s death, several years thereafter, it was in the custody of G. W. It also appeared that G. W. rented the premises to others, paid taxes and made repairs, and during his mother's life, after the deed had been executed, exercised such control over the property as usually attends ownership. *Held*, the testimony justified a finding that the deed was executed and delivered. *Strough v. Wilder.* 530
 3. In an action at law to recover for an injury in the nature of a trespass to real estate, the plaintiff's rights can be determined only in accordance with the situation existing when the action was commenced; where his title is put in issue he must stand or fall by the title and right to recover he then had, and no other. *Dean v. M. E. R. Co.* 540
 4. In an action brought to recover alleged damages caused by the unlawful construction and maintenance of defendant's railroad in front of plaintiff's premises, the question litigated was as to plaintiff's title and possession. Plaintiff was allowed to give in evidence, under objection and exception, a deed of the premises executed to him after the commencement of the action. *Held*, error. *Id.*
 5. Plaintiff gave in evidence a deed to himself, executed in 1860, and proved that, from the time of its delivery up to the commencement of the action, he received the rents and profits of the premises. Defendant thereupon put in evidence a deed from plaintiff to his wife which did not express any valuable or meritorious consideration. *Held*, that this conveyance did not show title out of plaintiff. *Id.*
 6. Defendant also introduced in evidence a deed from plaintiff and wife to R. Plaintiff then introduced a deed to his wife from R. and wife, and a deed from his wife to himself, all of which conveyances were duly acknowledged and recorded shortly after their respective dates. Plaintiff testified that the deed to R. was to secure a loan of \$2,800, which he paid, and then R. and wife reconveyed the premises to plaintiff's wife. Defendant's counsel requested the court to charge that the jury were not bound to believe plaintiff's statement that the deed to R. was a mortgage, he being an interested party and not having called anyone to corroborate him. Also, that if said deed and the one from R. to plaintiff's wife were intended to pass the title to the property to her, the verdict must be for defendant. These requests were refused. *Held*, error. *Id.*
 7. *It seems* that if the deed to R. was in fact a mortgage, his conveyance to plaintiff's wife and her conveyance to plaintiff operated to discharge the mortgage. *Id.*
- *What facts authorize presumption of title to real estate. See Roe v. Strong.* 316
- ### TOWNS.
1. A constable or sheriff in executing a certificate of a judgment of conviction issued to him as prescribed by the Code of Criminal

- Procedure (§§ 721, 725) is engaged in a criminal proceeding within the meaning of the act "to reduce the number of town officers and town and county expenses," etc. (Chap. 180, Laws of 1845, as amended by chap. 455, Laws of 1847), and the fees and expenses of the officer are included in the provisions of said act (§ 26, as amended) charging the expenses of certain criminal proceedings under the grade of felony upon the town or city where the offense was committed. *People ex rel v. Supra. West. Co.* 126
2. Accordingly *held*, that the account of a constable for fees and expenses in conveying to a penitentiary prisoners convicted and sentenced in the Court of Special Sessions of his town were a town and not a county charge, and so that a refusal of the board of supervisors of the county to audit it as a county charge was proper. *Id.*
 3. The legislature has power to legalize and validate a claim, supported by a moral obligation and founded in justice, against a town, which has already been declared invalid by the courts, because of failure on the part of the town officers to pursue strictly the prescribed statutory proceedings. *W. I. B. Co. v. Town of Attica.* 204
 4. Where a county treasurer, instead of applying taxes assessed on the property of a railroad corporation in a town to the payment or redemption of bonds of the town, issued in aid of the construction of the road of such corporation, as required by the act of 1869 (Chap. 907, Laws of 1869), as amended in 1871 (Chap. 283, Laws of 1871), applied them in payment of county and state taxes, with and as part of other moneys raised by the town for those purposes, *held*, that an action, as for money had and received, was maintainable on behalf of the town against the county to recover the money so misappropriated; that the liability included as well the portion of the funds applied in payment of the state tax as that applied for other county purposes; also, that the action was properly brought by the supervisor of the town in his name as its representative. *Strough v. Supra. Jeff. Co.* 212
 5. The cause of action in such case arises when the misappropriation is made; the statute of limitations then begins to run against it, and an action brought more than six years thereafter is barred. *Id.*
 6. While every duty imposed upon a public officer is in the nature of a trust, persons injured by a violation of the duty for which they may maintain an action at law, must pursue that remedy within the period of limitation of legal actions. *Id.*
 7. Also *held*, the fact that the supervisors of the town for the period of fourteen years were apprised from year to year, while sitting as members of the board of supervisors of the county, of the misappropriation and made no objection thereto, did not estop the town from claiming a repayment of the money. *Id.*
 8. A town cannot be estopped by the neglect of its supervisor to assert a claim against the county, the grounds of which are equally known to all members of the board of supervisors. *Id.*
 9. The powers of towns, and *it seems* other municipal corporations organized for governmental purposes, are limited and defined by the statutes under which they are constituted; they possess only such powers as are expressly conferred by statute or necessarily implied. *Wells v Town of Salina.* 280
 10. Towns have no general power to borrow money for municipal purposes or to pay town charges, but *it seems* it is the policy of the law that such charges shall be met by taxation, and a town may not be made liable for money borrowed on its credit simply because it has been applied for town purposes. *Id.*
 11. An action having been commenced by certain taxpayers of the

town of S. in their own behalf and that of other taxpayers to restrain the enforcement of certain town bonds, and to have the law under which they were issued adjudged unconstitutional, a resolution was adopted at an annual town meeting authorizing the supervisor of the town, on consent of the plaintiffs in said action, to assume control thereof, prosecute it to a final determination and pay all the expenses; and for that purpose to borrow on the credit of the town all sums of money needed. The supervisor, acting in accordance with the resolution, borrowed money on the credit of the town, giving its notes therefor, which money was used for the purpose specified. In an action upon the notes, *held*, that assuming the electors of the town had power to authorize its supervisor to take control of the pending action, also that it might be treated as if commenced in the name of the town or its supervisor, and that said electors had power to direct money to be raised for prosecuting that action, this action was not maintainable. *Id.*

12. The authorities upon the subject of the power of municipal corporations to borrow money collated. *Id.*

See ATTICA (TOWN OF).
BROOKHAVEN (TOWN OF).

TRESPASS.

1. In an action to recover damages for the erection, and to compel the removal, of a wharf and bridge alleged to have been unlawfully erected by defendants upon lands of plaintiffs, adjoining and under the waters of Setauket bay, in the town of Brookhaven, Long Island, plaintiffs claimed title to the land above high-water mark as descendants of F., one of the original proprietors of the town, to whom a lot including the upland adjoining the bay was allotted. It appeared that the structures in question extended above high-water mark in front of the F. lot. *Held*, that in the absence of any evidence of a reservation by the town of land above high-water mark, the

presumption was that plaintiffs' title extended to that mark; and so far as said structures extended above it, they were entitled to have them removed. *Roe v. Strong.* 816

2. As to the lands under water plaintiffs claimed title under a deed from S. to B., executed in 1768, which purported to convey "a certain piece of salt thatch," the bounds of which as given included the *locus in quo*. It appeared that plaintiffs and their predecessors in title, so far back as the memory of living witnesses extended, exercised acts of ownership by cutting thatch, leasing the right to cut to others, and in one instance brought suit against an alleged trespasser. It also appeared that, prior to 1698, the town had conveyed to a private person the land under water in the bay up to the line of and excepting that portion included in the deed to B. *Held*, that the evidence justified the presumption of a grant of the soil, and so made out a *prima facie* title in the plaintiffs; and that, therefore, a dismissal of the complaint was error. *Id.*

3. In an action at law to recover for injury in the nature of a trespass to real estate, the plaintiff's rights can be determined only in accordance with the situation existing when the action was commenced; where his title is put in issue he must stand or fall by the title and right to recover he then had, and no other. *Dean v. M. E. R. Co.* 540

4. In an action brought to recover alleged damages caused by the unlawful construction and maintenance of defendant's railroad in a street in front of plaintiff's premises, the question litigated was as to plaintiff's title and possession. Plaintiff was allowed to give in evidence under objection and exception, a deed of the premises executed to him after the commencement of the action. *Held*, error. *Id.*

5. Plaintiff gave in evidence a deed to himself executed in 1860, and

proved that, from the time of its delivery up to the commencement of the action he received the rents and profits of the premises. Defendant thereupon put in evidence a deed from plaintiff to his wife which did not express any valuable or meritorious consideration. *Held*, that this conveyance did not show title out of plaintiff.

Id.

6. Defendant also introduced a deed from plaintiff and wife to R. Plaintiff then introduced a deed to his wife from R. and wife, and a deed from his wife to himself, all of which conveyances were duly acknowledged and recorded shortly after their respective dates. Plaintiff testified that the deed to R. was to secure a loan of \$2,300, which he paid, and then R. and wife reconveyed the premises to plaintiff's wife. Defendant's counsel requested the court to charge that the jury were not bound to believe plaintiff's statement that the deed to R. was a mortgage, he being an interested party and not having called anyone to corroborate him. Also, that if said deed and the one from R. to plaintiff's wife were intended to pass the title to the property to her, the verdict must be for defendant. These requests were refused. *Held*, error. *Id.*

7. In an action against a railroad corporation to recover damages because of its interfering with plaintiff's rights in a street adjoining his premises, plaintiff is not entitled to a recovery for permanent diminution in value of the premises; but only damages sustained prior to the commencement of the action. *Ottenot v. N. Y., L. & W. R. Co.* 603

TRIAL.

1. Where upon trial before a referee, evidence is received and a question of fact is litigated, without any objection that the fact is admitted and the evidence is inadmissible under the pleadings, the referee is justified in refusing to find in accordance with the alleged admissions, and in determining the ques-

tion upon the evidence. *Mandeville v. Newton.* 10

2. In an action upon a promissory note against defendant as maker, it appeared that his signature thereto was procured by fraud. The note was purchased of the payee by R., before maturity, for half its face value. Plaintiff claimed as purchaser from R. Defendant's evidence tended to show that R. purchased with moneys furnished by plaintiff, who was present at the time of the transfer and directed R. to purchase. R. testified that he had no knowledge of the fraudulent origin of the paper, or of any facts constituting a defense. Neither the plaintiff nor the payee were sworn as witnesses. The trial court held that plaintiff, as matter of law, was entitled to recover the amount he paid for the note, but if anything beyond that was claimed, the case was one for the jury. Plaintiff having elected to take a verdict for the amount he paid for the note, a verdict was directed accordingly. *Held*, error; that the question as to whether plaintiff was a *bona fide* purchaser, was one of fact for the jury; as was also the question as to whether R. purchased for himself or as agent; that if in the latter capacity, although he was not chargeable with notice of the fraud, this would not shield plaintiff from the legal consequences of any notice he himself might have had. *Vosburgh v. Diefendorf.* 357

3. In a case triable by a jury, the direction of a verdict is only justified where the evidence conclusively establishes the right of the party in whose favor it is made. The test of the right is, whether the court would be bound to set a verdict aside as against evidence if rendered against the party in whose favor it was directed. *Bulger v. Rosa.* 459

4. *It seems*, the provision of the statute relating to fraudulent transfers and conveyances (2 R. S. 137, § 4), which declares that the question of fraudulent intent arising thereunder shall be deemed a question of fact and not of law, does

not interfere with the prerogative of the court to direct a verdict, although the case arises under the statute, provided the fraudulent intent is conclusively established on the face of the instrument of transfer or by the uncontradicted evidence. *Id.*

5. Where S. one of two copartners in a firm which to their knowledge was insolvent, as were also the individual members, assigned and transferred his interest in the partnership assets to B. his copartner, subject to the firm's debts, with the knowledge that the latter intended to transfer them to a firm and individual creditor, which transfer was made in payment of all the creditor's claims, and where in an action of replevin against a sheriff, who had levied upon the property under an execution in favor of a firm judgment creditor, the evidence as to value of the property transferred was conflicting, there being evidence tending to show, and from which the jury would have been authorized to find, that such value was not more than the claim of the transferee against the firm, and, that the object of S. in transferring his interest, was that the property should be used to pay the firm debt, *held*, the fact that the individual debts were named as part of the consideration, was not conclusive evidence of fraud; that the question of fraud in the transfer was one of fact for the jury; and that, therefore, a direction of a verdict for defendant was error. *Id.*

6. In an action of trespass where plaintiff's title was in issue, defendant introduced in evidence a deed to his wife from R. and wife, and a deed from his wife to him—himself, all of which conveyances were duly acknowledged and recorded shortly after their respective dates. Plaintiff testified that the deed to R. was to secure a loan of \$2,300, which he paid, and then R. and wife reconveyed the premises to plaintiff's wife. Defendant's counsel requested the court to charge that the jury were not bound to believe plaintiff's statement that the deed to R. was a mortgage, he being an interested

party and not having called anyone to corroborate him. Also, that if said deed and the one from R. to plaintiff's wife were intended to pass the title to the property to her, the verdict must be for defendant. The requests were refused. *Held*, error. *Dean v. M. E. R. Co.* 540

7. In an action against a corporation upon an alleged contract, the making of the contract was expressly admitted by the answer and an affirmative defense set up. On the trial the admission in the pleading was not alluded to, but plaintiff gave proof of the execution of the contract by one of defendant's officers. The court directed a verdict for plaintiff. *Held*, that although the court might have been in error in holding the contract proved, plaintiff had the right to avail himself of the admission, to sustain the ruling on appeal, even if it was not taken into consideration by the court below. *Teal v. C. E. L. Co.* 654
8. *It seems* that if the case had been submitted to the jury upon the evidence, and they had rendered a verdict for defendant, plaintiff, having acted upon the theory that the contract was in issue, could not, upon appeal or motion to set aside the verdict, have relied upon the admission. *Id.*

— *When question not raised on trial may not be presented on appeal. See Varnum v. Hart.* 101

— *Question as to non-joinder of parties, where alleged defect appears in complaint and is not raised by demurrer, is waived and cannot be raised on trial.*

See Sullivan v. N. Y. & R. C. Co. 348

See CRIMINAL TRIAL.

TRUSTS AND TRUSTEES.

1. In 1887 plaintiff, with other corporations engaged in the manufacturing of carbon, entered into a contract with H., the object of which was, by a combination, to vest in H., as a common trustee,

- the management and control of the business of manufacturing and selling their products. The several companies agreed to lease to such trustee their respective factories, and operate them under his direction. He was to designate the kind of goods to be manufactured, fix the prices at which and the persons to whom they should be sold, and, after paying expenses, divide the net proceeds and profits as provided in the contract. When this contract was made, plaintiff had an outstanding contract to furnish carbons to the B. E. L. Co. from time to time. Plaintiff assigned to H., as such trustee, all existing contracts, and he assumed their performance. Carbons manufactured at plaintiff's factory in April, May and June, 1887, were billed in the name of H., and delivered under said contract to the B. E. L. Co. About July, 1887, plaintiff refused to continue in the combination, and an action was commenced against the trustee and the contracting corporations to dissolve the same, which resulted in the appointment of defendant as receiver of its property. In an action brought by plaintiff to recover for said carbons, the B. E. L. Co. paid the amount into court. The court found that the contract to combine was made for unlawful purposes, and was illegal; that the trust was then insolvent, and its assets, including the claim against the B. E. L. Co., insufficient to pay its creditors. *Held*, that, as between the plaintiff and the receiver, the latter was entitled to the fund; that plaintiff stood in the position of a party to an illegal contract claiming a fund, which, if the contract was valid, belonged to the trust combination, and to sustain the action would permit it to escape from the operation of the rule which denies affirmative relief to a party to an illegal contract. *P. C. Co. v. McMillen.* 46
2. In the absence of creditors, an administrator is a mere trustee for the next of kin, charged with the sole duty to collect, convert and distribute the estate. *Ledyard v. Bull.* 62
3. Where, therefore, the whole estate has been legally and justly distributed, there is no trust duty to be performed and no need of a trustee. *Id.*
4. The will of K. gave her residuary estate to her executors in trust, to receive rents, profits and income, and after paying therefrom certain specific annuities, among them one of \$500 to D., her adopted son, for his support during minority, and \$1,000 thereafter during the life of her husband, to apply the balance to the use of her husband during his life. After his death to pay D. \$2,000 per annum during his life. D. survived the husband, and for a number of years after the death of the latter the annual income was insufficient to pay the said annuity in full. Subsequently it exceeded that amount. Upon a settlement of the accounts of the trustee, *held*, that, in the absence of any language in the will showing a different intent, D. was entitled to have the surplus applied in the first instance to the satisfaction of deficiencies in the annuity for the years it was not paid in full. *In re Chauncey.* 77
5. *It seems*, if in any year, after full payment of deficiencies for the years preceding, there remained a surplus of income, as it was undisposed of by the will, it would have been competent for the trustees to have paid it over for distribution among the next of kin. *Id.*
6. The provision of the act of 1883 (Chap. 392, Laws of 1883), declaring that "All debts and obligations for the payment of money due or owing to persons residing within this state * * * wherever said securities shall be held shall be deemed, for the purpose of taxation, personal property within this state, and shall be assessed as such to the owner or owners," refers to debts or obligations which are solely due and owing to residents of this state; it does not include as owners persons who are trustees only, and while under the old law if a trustee residing here has possession of such securities he may be assessed for

them as a trustee in possession, even if there be other trustees non-resident; the resident trustee may not be assessed for securities not held by him and not within this state, but which are in possession of one of the non-resident trustees. *People ex rel v. Coleman.*

137

7. Accordingly *held*, where two of three co-trustees resided in this state, and the other resided in another state, the beneficiaries also being non-residents, that an assessment of securities in the hands of the non-resident trustee was void. *Id.*

8. Where a testator, in creating a trust in real estate, has withheld from the trustees a power of sale and organized the trust for a fixed period, it amounts to a direction that the land, not its proceeds, shall be held for the beneficiaries, and a sale by the trustees would be in contravention of the trust, unless an emergency has arisen in which funds are required to save the estate from threatened loss, to improve it, where authority to improve is given, or to prevent serious and increasing injury. *In re Roe.*

509

9. Under the provisions of the act of 1886 (Chap. 257, Laws of 1886), which authorizes a sale of real estate, held in trust, whenever it appears "that it is for the best interest of the estate so to do, and that it is necessary and for the benefit of the estate to raise * * * funds for the purpose of preserving or improving such estate," to justify an order of sale some necessity must be shown to exist for the use of the money in the preservation or improvement of the property which the estate is not in a condition to supply, and which can only be supplied by borrowing upon a mortgage or selling a part and using the proceeds. A sale may not be ordered for the purpose of reinvestment and with a view only to increase the income, even though the real estate be unproductive. *Id.*

10. The will of F. created a trust in her executors to receive the rents

and profits of the trust estate and the accumulations therefrom, and "after payment of all taxes and assessments and of so much money as may be necessary for repairs, insurance or improvements, or betterments of any or all" of the real estate, to invest the balance as prescribed. An application under said statute for leave to sell certain of the real estate was based solely upon the ground that the sale and reinvestment of the proceeds would result in increasing the trust fund; no necessity for the sale was shown; on the contrary, it appeared the income after all the disbursements authorized, was ample for all the purposes of the trust. *Held*, that an order of sale was erroneously granted; that the improvements contemplated were not of the trust fund, but of the real estate, and of the class indicated by the other elements of the phrase used.

Id.

UNDERTAKING.

1. In an action to recover the possession of personal property, when the defendant gives an undertaking for the return of the property, admitting therein that plaintiff has taken the property described in his affidavit and requisition from defendant's possession, he is estopped from denying that he had possession of the property, or any part thereof, at the commencement of the action, or from showing that it was different or other property; he is concluded by the recitals in the undertaking. *Martin v. Gilbert.*

298

2. The effect of the recital, as an estoppel, is not taken away by the fact that after the return of the property to the defendant, he serves an answer, denying that he ever had possession of the property mentioned in the complaint or affidavit accompanying the requisition; nor is its effect disturbed by the provision of the Code of Civil Procedure (§ 1704), giving defendant a right to a return of the property replevied, on giving a bond, although it be not the property described in the requisition. *Id.*

3. *It seems*, where the property replevied is not that described, it is not necessary or proper to recite in the bond that it is. *Id.*

4. In proceedings to assess damages upon an undertaking given by plaintiff, in an action to set aside a bond and mortgage, in accordance with the condition of an order granting a temporary injunction to restrain a foreclosure, it appeared that there remained, after paying the costs of the foreclosure, the costs of the action and the deficiency upon the sale, in accordance with the terms of the undertaking, a margin sufficient to cover the damages allowed upon confirmation of the referee's report. The sureties bid in the property on the foreclosure sale and sought to include as a payment on account of the undertaking, the amount of their bid; this was disallowed. *Held*, no error; that the purchase of the premises by the sureties to protect themselves did not affect the question of the damages assessable against them. *Holcomb v. Rice.* 598

5. On an appeal in an action for the foreclosure of a mortgage, an undertaking against waste and for the value of the use and occupation of the mortgaged premises operates as a stay of proceedings without a covenant to pay a deficiency, and it is optional with the appellant which form of undertaking he will give. (Code Civ. Pro. § 1831.) *Werner v. Tuch.* 632

VENDOR AND PURCHASER.

1. *It seems* that on a purchase of promissory notes, appearing on their face to be valid and uncanceled obligations, but which in fact have been paid, or the indorsers upon which have been discharged to the knowledge of the vendor, the vendee, in case he purchased without notice, has a cause of action against the vendor, based upon an implied warranty that the notes were what they appeared to be. *Manderille v. Newton.* 10

2. Where, however, a party holding certain notes, with other indebtedness against the maker, and holding certain claims as collateral security therefor, and who had made various collections on the collaterals, sufficient to pay the notes, but which had not been employed in payment of any specific items of indebtedness, at the instance of the debtor, and on payment of the balance due him, assigned his claims and transferred the notes with the collaterals to another creditor, without any express warranty that the notes were valid outstanding obligations, *held*, that no warranty could be implied. *Id.*

WAIVER.

Question as to non-joinder of parties where alleged defect appears in complaint and is not raised by demurrer, is waived and cannot be raised on trial. *Sullivan v. N. Y. & R. C. Co.* 848

— *Of conditions in policy of life insurance, what evidence sufficient to make question one for jury.*

See Wyman v. P. M. L. Ins. Co. 274

WARRANTY.

1. *It seems* that on a purchase of promissory notes, appearing on their face to be valid and uncanceled obligations, but which in fact have been paid, or the indorsers upon which have been discharged to the knowledge of the vendor, the vendee, in case he purchased without notice, has a cause of action against the vendor, based upon an implied warranty that the notes were what they appeared to be. *Manderille v. Newton* 10

2. Where, however, a party holding certain notes, with other indebtedness against the maker, and holding certain claims as collateral security therefor, and who had made various collections on the collaterals, sufficient to pay the notes, but which had not been applied in payment of any spe-

cific items of indebtedness, at the instance of the debtor, and on payment of the balance due him, assigned his claims and transferred the notes with the collaterals to another creditor, without any express warranty that the notes were valid outstanding obligations, *held*, that no warranty could be implied. *Id.*

WAY.

See PRIVATE WAY.

WIDOW.

See DOWER.

WILLS.

1. The will of K. gave her residuary estate to her executors in trust, to receive rents, profits and income, and after paying therefrom certain specific annuities, among them one of \$500 to D., her adopted son, for his support during minority, and \$1,000 thereafter during the life of her husband, to apply the balance to the use of her husband during his life. After his death to pay to D. \$2,000 per annum during his life. D. survived the husband, and for a number of years after the death of the latter the annual income was insufficient to pay the said annuity in full. Subsequently it exceeded that amount. Upon a settlement of the accounts of the trustee, *held*, that, in the absence of any language in the will showing a different intent, D. was entitled to have the surplus applied in the first instance to the satisfaction of the deficiencies in the annuity for the years it was not paid in full. *In re Chauncey.* 77
2. *It seems*, if in any year, after full payment of deficiencies for the years preceding, there remained a surplus of income, as it was undisposed of by the will, it would have been competent for the trustees to have paid it over for distribution among the next of kin. *Id.*
3. B., by his will, gave to his widow, in lieu of dower, one-third of his personality absolutely, and the net income for life of one-third of his real estate, which was vested in a trustee for that purpose. About three years after B. died, the widow brought an action in which she asked that she might be permitted to make her election, renounce the testamentary provision and have her dower assigned, on the ground that she was ignorant of the extent of her husband's estate until the executor filed his accounts, and was induced to omit to take the steps necessary to claim dower by representations of the executor made in the presence of S., the principal beneficiary under the will, and by S. as to the value of her dower right. *Held*, that plaintiff was not entitled to the relief sought. *Akin v. Kellogg.* 441
4. The provision of the statute (1 R. S. 741, §§ 13, 14) requiring a widow to elect within one year between a provision made for her in her husband's will and the right to have her dower in his real estate admeasured, and declaring that she shall be deemed to have elected to take the testamentary provision, unless within that time she shall enter upon the lands to be assigned to her for dower, or commence proceedings for the assignment thereof, has the force of a statute of limitations, and she is at once, on the death of the testator, charged with the duty of informing herself, so as to make her election. *Id.*
5. The will of F. created a trust in her executors to receive the rents and profits of the trust estate and the accumulations therefrom, and "after payment of all taxes and assessments and of so much money as may be necessary for repairs, insurance or improvements or betterments of any or all" of the real estate, to invest the balance as prescribed. An application under said statute for leave to sell certain of the real estate was based solely upon the ground that the sale and reinvestment of the proceeds would result in increasing the trust fund; no

- necessity for the sale was shown; on the contrary, it appeared the income after all the disbursements authorized, was ample for all the purposes of the trust. *Held*, that an order of sale was erroneously granted; that the improvements contemplated were not of the trust fund, but of the real estate, and of the class indicated by the other elements of the phrase used. *In re Roe*. 509
6. Where the probate of a will was contested upon the ground that the instrument was fabricated after the death of the testator by O., one of the witnesses thereto, and the proof on the part of the contestants consisted mainly of acts and declarations of O., who had died prior to the trial, tending to show that the testator died intestate, and that O. fabricated the instrument, *held*, it was competent to prove declarations of O., during the life of the testator, to the effect that he had made a will. *In re Hedra*. 615
7. *It seems*, that declarations of a deceased subscribing witness to a will are competent to impeach its execution so far as his signature thereto is concerned; they have no other effect however than to impair the force of his signature as evidence of the performance of the conditions stated in the attesting clause. *Id*.
8. Where, therefore, evidence is given sufficient to sustain a finding that the signatures to a will are genuine, the surrogate is not required to refuse probate by proof of declarations on the part of a deceased subscribing witness to the effect that he fabricated the will. *Id*.

E. J. M.

ERRATUM.

In *People v. Platt* (117 N. Y. 165), insert at bottom of page after the word "answer" the following: "or the defendant's own testimony, it appeared that he was."

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police commissioners may not act upon their own knowledge, the charges must be tried and the guilt established on evidence; but in inflicting punishment, they may take into consideration both the evidence and their knowledge of the officer. *Id.*

POSSESSION.

1. Actual possession of real estate is sufficient notice to all the world of the existence of any right which the person in possession is able to establish. *Phelan v. Brady.* 587

2. In an action brought to foreclose a mortgage upon certain premises given by M., who held an apparently perfect record title to the same, it appeared that before the execution of the mortgage, M. had conveyed the premises to B. who was in possession, and, with her husband occupied two rooms in the buildings on the premises; he also kept a liquor store in a part thereof; the other rooms she leased to various tenants, claiming to be owner, and she collected the rents. Her deed was not recorded until after the giving of the mortgage. *Held*, that B.'s actual possession under her deed, although unrecorded, and its existence unknown to the plaintiff, was sufficient notice to him of her rights to defeat any claim under the mortgage. *Id.*

3. Also, *held*, that the fact that B. and her husband occupied the store and a living apartment in the building prior to the time she went in possession under her contract of purchase could not aid the plaintiff. *Id.*

See ADVERSE POSSESSION.

POWERS.

1. The provision of the Revised Statutes (1 R. S. 737, § 124), declaring that "every instrument executed by the grantee of a power, conveying an estate, or creating a charge which such grantee would

have no other right to convey or create, unless by virtue of his power, shall be deemed a valid execution of the power, although such power be not recited or referred to therein," was not intended to change then existing rules; and whenever, in addition to the power, the grantee has an independent interest in the property, whether legal or equitable, the rule of the statute does not apply, and the instrument will not be deemed an execution of the power, but only a conveyance of the independent interest. *M. L. I. Co. v. Shipman.* 324

2. The will of S. devised his real estate to his wife as long as she should remain his widow, and upon her death or remarriage, to their children. He made her executrix, and the will authorized her to make advances from the property, from time to time, in her discretion, to the children "for maintenance and support," and empowered her to mortgage, lease and dispose of such property for the purpose of carrying into effect the provisions of the will. The widow married and subsequently executed a mortgage on said real estate in her individual name to secure a loan. The mortgage contained no reference to the character of the mortgagor as executrix, or to the power to mortgage contained in the will. This mortgage was paid from the proceeds of a loan obtained from plaintiff upon a mortgage of the same property, executed by the widow individually and as executrix. In an action to foreclose the latter mortgage, it appeared that plaintiff had knowledge that the purpose of the mortgagor was to pay the prior loan with the money borrowed; such prior loan was procured for the benefit of the widow's second husband. *Held*, that upon the marriage of the widow the fee of the real estate vested in the children, subject to the execution of the power of sale and to the widow's right of dower; that the interest mortgaged must be restricted to the individual interest which the mortgagor had as doweress; that although her dower right while unassigned did not

plaintiffs and their predecessors in title, so far back as the memory of living witnesses extended, exercised acts of ownership by cutting thatch, leasing the right to cut to others, and in one instance brought suit against an alleged trespasser. It also appeared that, prior to 1693, the town had conveyed to a private person the land under water in the bay up to the line of and excepting that portion included in the deed to B. *Held*, that the evidence justified the presumption of a grant of the soil, and so made out a *prima facie* title in the plaintiffs; and that, therefore, a dismissal of the complaint was error. *Id.*

4. The possession of a deed by the grantee is *prima facie* evidence of delivery, when there is nothing to impeach the *bona fides* of his possession. *Strough v. Wilder.* 530

5. After the writ of certiorari was issued, the assessment-roll having been placed in the hands of the proper officer for collection, the relators paid the taxes imposed upon the property, leaving, however, with the officer a writing, stating that the taxes were paid under protest, for the reason that the assessment was excessive and that for the correction thereof, proceedings were then pending. *Held*, that in the absence of any evidence as to the circumstances under which the payment was made, the presumption was, that the payment was involuntary, and so, did not estop the relators. *People ex rel. v. Carter.* 557

6. Possession of land is always presumed to be in subordination to the true title, and one who claims to have acquired title by adverse possession must show that he or his predecessors in interest held the land in hostility to the true owner claiming the title thereto. *Doherty v. Matsell.* 646

PRINCIPAL AND AGENT.

In an action upon certain promissory notes made payable to defendant, a domestic corporation, and indorsed by L., as its president, it

appeared that the defendant had its main office in the city of New York, and, while a portion of its business was transacted and most of its purchases and sales were made in other states and countries, its principal business operations were carried on in that city, and the annual meetings of its directors were there held. L. was its president and treasurer, the general manager of all its business affairs in said city, and the only officer in attendance at its office there; he paid the current accounts of the company, indorsed checks made payable to its order, the discount of business paper and the use of its money for its purposes, and the account of the same on its cash books were daily and permitted transactions. Defendant had no cash capital, and its working capital was borrowed on the credit of the company; this was done principally by L., and mainly by the use of paper indorsed by him in its name; the evidence tended to show that this was with the knowledge and acquiescence of the directors. *Held*, that the evidence required the submission of the question of the authority of L. to bind defendant by indorsements, to the jury; and that a dismissal of the complaint on trial was error. *F. N. Bank v. N. P. Co.* 256

See BROKERS.
FACTORS.

PRIVATE WAY.

1. H., plaintiff's testator, being the owner of land upon which was a residence built for and used as a gentlemen's country seat, obtained from defendant, by purchase and grant, a right of way from said land to a public highway across the farm of the latter, over a piece of land described. The premises of H. had no other connection with the highway than the way thus granted. The land described in the grant, over which the way was granted, was, at the time, rocky and uneven, not adapted to purposes of cultivation, or for a carriage-way, until prepared for that purpose. H. prepared a road-bed, constructed thereon a

the language of the grant should be regarded, and, when that is uncertain or ambiguous, the circumstances surrounding it, and the situation of the parties, with a view of arriving at the true intent of the parties. *Id.*

PRIVILEGED COMMUNICATIONS.

Upon trial of a criminal action, physicians who have been sent to the jail by the district attorney to make an examination of the prisoner were permitted to testify, as witnesses for the prosecution, to his mental condition, under the objection that either the relation of patient and physician existed, or else the prisoner was compelled to furnish evidence against himself. *Held*, no error; no evidence having been called for as to the prisoner's statements or as to transactions in the jail. *People v. Kemmer*. 580

PUNISHMENT.

1. The provisions of the Code of Criminal Procedure §§ 491, 492, 503, 504, 505, 506, 507, 508 and 509 as amended by chap. 489, Laws of 1900 changing the mode of inflicting the death penalty, do not violate the constitution, nor in their intent or effect violate the constitution. *Held*. 569

The provision of Art. 1, § 17 of the constitution prohibiting the infliction of cruel and unusual punishments, does not require the legislature to declare the punishment of death as prescribed by the constitution to be in fact cruel and unusual. *Id.*

The legislature, however, has the power to change the manner of inflicting the death penalty; this is a question of punishment, not of the mode. *Id.*

The use of electricity as a means of producing death constituted a more humane method of execution than that formally used was a question for the legislature, and its determination in this regard is conclusive. *Id.*

QUESTIONS OF LAW AND FACT.

— *When question of negligence one of fact.*

See Weil v. D. D., E. B. & B. R. Co. 147

See Ouderkirk v. C. N. Bank. 263

— *When question of negligence one of law.*

See Dobbins v. Brown. 188

See Larkin v. O'Neill. 221

See Danaher v. City of Brooklyn. 241

— *When question as to authority of officer of corporation to indorse and transfer notes made payable to it one of fact.*

See F. N. Bank v. N. P. Co. 250

— *When question as to waiver of conditions on policy of life insurance one of fact for jury.*

See Wyman v. P. M. L. Ins. Co. 274

— *When question as to whether a transaction amounted to a bailment or sale one of fact for jury.*

See Crosby v. President, etc., D. & H. C. Co. 334

— *When the evidence in proceedings against an officer of the police force of New York city, charged with "conduct unbecoming an officer," fails to show any breach of discipline or conduct unbecoming an officer, the case presents a question of law reviewable by the General Term on certiorari, and also reviewable here.*

See People ex rel. v. French. 493

RAILROAD CORPORATIONS.

1. Under the provision of the General Railroad Act of 1850 (§ 13, chap. 140, Laws of 1850), which authorizes a corporation organized under it to obtain, by condemnation, such lands as are "required for the purposes of its incorporation," only such and so much land may be condemned as the proper execution of the corporate purposes shall require and render necessary. *In re S. B. R. R. Co.* 141

2. Under the provision of the Street Railroad Act of 1884 (§ 3, chap.

252, Laws of 1884), giving to a corporation organized under it the right to construct its road "through, along and upon any private property which said company may require for the purpose," and giving it the powers and privileges granted to corporations organized under the General Railroad Act, conceding that a street railroad corporation has power to condemn lands of a private owner in some cases and for some purposes, as to which *quære*, the purposes are those, and those only, which the law of its organization describes and defines, and which are certified to in its articles of association; those purposes are limited to the construction of a street surface railroad. *Id.*

3. Where, therefore, the articles of association of a corporation organized under the Street Railroad Act, stated its purpose to be to construct and operate a street surface railroad through certain specified avenues in the village of E., and the corporation subsequently filed a map of its intended route, which was not along the specified streets, but was located upon private property outside of the streets for nearly the whole distance, *held*, the corporation had no right to condemn the lands upon which the proposed route was located, as they were not required for the purposes of its incorporation; that while a right to change the specified route might exist, this did not authorize a change which involved not only a contradiction and violation of the articles of association, but also of the character and quality of the corporation. *Id.*

4. In an action to recover damages for injuries alleged to have been caused by defendant's negligence, plaintiff's evidence was to this effect: Plaintiff, a child two years of age, lived with her parents on the first floor of a building fronting on a street twenty-six feet wide from curb to curb, through which defendant's road runs; her father carried on the bakery business on the same floor. Plaintiff was with her father in the store,

IN 1907 A TRAIN ON A ROAD OF
 THE STATE WAS HIT BY A
 TRAIN FROM THE NEARBY AND
 THE PASSENGER WAS KILLED. THE
 TRAIN WAS STOPPED BY ONE OF
 THE ENGINEERS. THE PASSENGER
 WAS KILLED BY ONE OF THE
 ENGINEERS. THE PASSENGER WAS
 KILLED BY ONE OF THE ENGINEERS.
 Plaintiff was
 injured on the ground that her
 train was negligent in omit-
 ting to exercise a proper degree of
 care and watchfulness. *Held*,
 that the question was one
 for the jury. *Weil v. D.*
E. & B. R. Co. 147

1. A railroad corporation, for the
 safety of its passengers as well as
 its employees, is bound to use suit-
 able care and skill in furnishing
 not only adequate engines and
 cars, but also a safe and proper
 track and road-bed. The track
 must be properly laid, the road-
 bed properly constructed, and
 reasonable prudence and care ex-
 exercised in keeping the track free
 from obstructions, animate and in-
 animate, and if, from want of
 proper care, such obstructions are
 permitted to be, or to come upon
 the track, and a train is thereby
 wrecked, the corporation is re-
 sponsible for injuries received by
 any person thereon, whether pas-
 senger or employe. *Donnegan v.*
Erhardt. 468

6. In an action to recover damages
 for injuries received by plaintiff,
 who was a brakeman in the em-
 ploy of defendant, it appeared
 that the injuries were caused by a
 collision in the night-time be-
 tween the train upon which plain-
 tiff was employed and a horse
 which plaintiff claimed came upon
 the track through defendant's neg-
 ligence in permitting the fence
 along its road to become out of
 repair. The case was submitted
 to the jury, with instructions that
 if the horse came upon the track
 through a fence which defendant
 was bound to maintain and keep
 in repair, and which was negli-
 gently permitted to be out of re-
 pair, plaintiff could recover. *Held*,
no error. *Id.*

Under the provisions of the
 General Railroad Act (§ 44, chap.

140. Laws of 1850, requiring rail-
 road corporations to build and
 keep in repair fences on the sides
 of their roads, and providing that
 they "shall be liable for damages
 which shall be done * * * to
 any cattle, horses, sheep or hogs
 thereon," an absolute duty is im-
 posed upon said corporations to
 fence their tracks, not simply to
 protect the lives of animals, but
 also to protect persons upon their
 trains, and for violation of said
 statutory duty, causing injury,
 such a corporation is liable. *Id.*

8. *It seems* that, independent of the
 statute, a jury may find that it is
 the duty of a railroad company to
 fence its track to guard against
 such dangers. *Id.*

9. In an action against a railroad
 corporation to recover damages
 because of its interfering with
 plaintiff's rights in a street adjoin-
 ing his premises, plaintiff is not
 entitled to a recovery for perma-
 nent diminution in value of the
 premises; but only damages sus-
 tained prior to the commencement
 of the action. *Ottenot v. N. Y.,*
L. & W. R. Co. 603

— *As to sufficiency of evidence of*
plaintiff's title in action against a
railroad corporation to recover dam-
ages for alleged unlawful construction
and operation of road in street in
front of plaintiff's premises.
See Dean v. M. E. R. Co. 540

REAL PROPERTY.

1. Oil in the earth belongs to the
 owner of the land, and when un-
 lawfully taken therefrom by a
 wrong doer the title of such owner
 remains perfect, and he may pur-
 sue and reclaim the property
 wherever he may find it. *Hughes*
v. U. P. Lines. 423

2. Actual possession of real estate is
 sufficient notice to all the world of
 the existence of any right which
 the person in possession is able
 to establish. *Phelan v. Brady.* 587

3. Possession of land is always pre-
 sumed to be in subordination to
 the true title, and one who claims

to have acquired title by adverse possession must show that he or his predecessors in interest held the land in hostility to the true owner claiming the title thereto. *Doherty v. Mastell.* 646

RECEIVER.

1. In 1887 plaintiff, with other corporations engaged in the manufacturing of carbon, entered into a contract with H., the object of which was, by a combination, to vest in H., as a common trustee, the management and control of the business of manufacturing and selling their products. The several companies agreed to lease to such trustee their respective factories, and operate them under his direction. He was to designate the kind of goods to be manufactured, fix the prices at which and the persons to whom they should be sold, and, after paying expenses, divide the net proceeds and profits as provided in the contract. When this contract was made plaintiff had an outstanding contract to furnish carbons to the B. E. L. Co. from time to time. Plaintiff assigned to H., as such trustee, all existing contracts, and he assumed their performance. Carbons manufactured at plaintiff's factory in April, May and June, 1887, were billed in the name of H., and delivered under said contract to the B. E. L. Co. About July, 1887, plaintiff refused to continue in the combination, and an action was commenced against the trustee and the contracting corporations to dissolve the same, which resulted in the appointment of defendant as receiver of its property. In an action brought by plaintiff to recover for said carbons, the B. E. L. Co. paid the amount into court. The court found that the contract to combine was made for unlawful purposes, and was illegal; that the trust was then insolvent, and its assets including the claim against the B. E. L. Co. insufficient to pay its creditors. *Held*, that, as between the plaintiff and the receiver the latter was entitled to the fund; that plaintiff stood in

the position of a party to an illegal contract claiming a fund, which, if the contract was valid, belonged to the trust combination, and to sustain the action would permit it to escape from the operation of the rule which denies affirmative relief to a party to an illegal contract. *P. C. Co. v. McMillin.* 46

2. As to whether, if the B. E. L. Co. had not paid the funds into court, plaintiff could have enforced a recovery against it, although there was no adverse claimant, *quære.* *Id.*
3. A receiver of an insolvent corporation unites in himself, not only the rights of the corporation, but those of creditors; he may in the interest of creditors, assert a claim which he might be unable to do as a representative solely of the corporation, and he may disaffirm dealings of the corporation in fraud of the creditor's rights. *Id.*
4. Certain creditors of a corporation, whose claims against it were valid and past due, and against which there was no defense, knowing the corporation to be insolvent, and for the purpose of obtaining a preference over other creditors, commenced action against it, the summons being served upon D., one of its directors, under an arrangement with him that he would not disclose the service to the other officers; he carried out the agreement and suffered said creditors to obtain judgment by default. The corporation had no real estate and its personal property was levied upon and sold under execution issued on said judgments. In an action brought by a receiver of the corporation, appointed subsequent to the levy, to have the judgments declared void and set aside, *held*, that the arrangement did not constitute an assignment or transfer; that there was no violation of said statute; and that the action was not maintainable. *Varnum v. Hart.* 101
5. Also *held*, that as the sheriff had seized upon the property and had it in his possession at the time of the appointment of the receiver

the sale was not absolutely final but at most could be made to be simply irregular. 20

4. A court of original jurisdiction has not power to appoint a receiver in an action in which a receiver has been appointed in the same case in the plaintiff, to make an order continuing the receivership after judgment shall have been rendered during the pendency of an appeal which may be taken therefrom. *Colwell v. ...* 408

7. It seems where the provisions of the Code of Civil Procedure, in relation to the appointment of receivers, are applicable, and they furnish an adequate remedy, the power of the court is limited by that section, and it must proceed in the manner therein provided, otherwise its orders will be void. *Id.*

8. It seems the court may appoint a receiver after judgment, and pending an appeal, although the judgment denies relief to the plaintiff; but the Code contemplates that such application will be made upon the whole case, including the adverse judgment, and does not permit the order to be made in anticipation of the judgment. *Id.*

9. Accordingly held, where after trial and a decision adverse to plaintiff in an action in which a receiver had been appointed, but before judgment, an order was granted continuing the receivership until after the decision of any appeal from the judgment, that the receiver had no authority after the entry of judgment to bring an action to recover a claim, a part of the assets in his hands as receiver; and where the facts appeared in the complaint in such an action, that it was a good ground for a demurrer. *Id.*

RECORDING ACT.

In an action brought to foreclose a mortgage upon certain premises given by M., who held an apparently perfect record title to the same, it appeared that before the

execution of the mortgage, M. conveyed the premises to B. who was in possession, and, with her husband, occupied two rooms in the buildings on the premises; he also kept a liquor store in a part thereof; the other rooms she leased to various tenants, claiming to be the owner, and she collected the rents. Her deed was not recorded until after the giving of the mortgage. Held, that B.'s actual possession under her deed, although unrecorded, and its existence unknown to the plaintiff, was sufficient notice to him of her rights to defeat any claim under the mortgage. *Phelan v. Brady.* 587

RECOVERY OF POSSESSION OF PERSONAL PROPERTY.

1. In an action to recover the possession of personal property, when the defendant gives an undertaking for the return of the property, admitting therein that plaintiff has taken the property described in his affidavit and requisition from defendant's possession, he is estopped from denying that he had possession of the property, or any part thereof, at the commencement of the action, or from showing that it was different or other property; he is concluded by the recitals in the undertaking. *Martin v. Gilbert.* 298

2. The effect of the recital, as an estoppel, is not taken away by the fact that after the return of the property to the defendant, he serves an answer, denying that he ever had possession of the property mentioned in the complaint or affidavit accompanying the requisition; nor is its effect disturbed by the provision of the Code of Civil Procedure (§ 1704), giving defendant a right to a return of the property replevied, on giving a bond, although it be not the property described in the requisition. *Id.*

3. It seems, where the property replevied is not that described, it is not necessary or proper to recite in the bond that it is. *Id.*

4. In such an action, as plaintiff's affidavit, requisition and the re-

turn of the officer are made by the Code of Civil Procedure (§ 1717) part of the judgment-roll and a copy of them is required to be furnished to the court or referee on trial, it is not necessary to put them formally in evidence in order that the court may consider them.

Id.

REDEMPTION.

1. In an action brought by plaintiff, as receiver of the P. H. S. & I. Co., the complaint alleged in substance that said company executed to defendants' firm, chattel mortgages on all its property, consisting of buildings, machinery, tools, etc.; that default having been made in payment, defendants took possession of the property and sold it at auction, they bidding it in for \$1,000; that none of the property was in view of the persons attending the sale; that it was all put up in a lump and sold together at the request of defendants, although they knew it could be sold in parcels, and greater sums realized for it if so sold; that none of the company's officers were present; that since the sale defendants have claimed to own the property and have sold \$10,000 or \$15,000 of it; that at the time of the sale the property was worth about \$60,000, and the company's indebtedness to defendants did not exceed \$20,000. The relief asked was that defendants be required to account for the value of the property, and after application of sufficient to extinguish the debt secured that plaintiffs have judgment for the balance. A demurrer to the complaint was sustained because of the omission of an averment of a tender to defendants of the amount conceded to be due and unpaid on the mortgages, or an offer to pay that amount on its being ascertained. *Held*, error; that the sale to defendants was voidable and could be vacated and set aside as part of the relief in this action; that the amount received by defendants on the sales made by them was applicable and must be deemed to have been applied upon the mortgages, and the property remaining in their hands to be held as security for the balance

due; that a tender before suit, or an offer in the complaint to pay was not necessary and the omission thereof was only important as bearing upon the question of costs; that the facts alleged in the complaint were sufficient to show a right of redemption in plaintiff and the action should be treated as one to redeem and for such incidental relief as is necessary to accomplish the redemption. *Cas-serly v. Witherbee*. 522

2. *It seems* that in such an action payment of the amount found due should be required by the judgment, upon and as a condition of redemption, and that a dismissal of the complaint on default of payment under the judgment would operate as a foreclosure. *Id.*

REFERENCE.

1. Where upon trial before a referee, evidence is received and a question of fact is litigated, without any objection that the fact is admitted and the evidence is inadmissible under the pleadings, the referee is justified in refusing to find in accordance with the alleged admissions, and in determining the question upon the evidence. *Mandeville v. Newton*. 10
2. Although a referee, in his report, places a finding of fact among his conclusions of law, this does not deprive it of its force. *In re Clark*. 427
3. In proceedings under the provisions of the Code of Civil Procedure (§ 2606), giving the surrogate jurisdiction upon the death of an executor to require his executor or administrator to account for and deliver over the trust estate, the referee to whom the matter was referred by the surrogate found as facts that a large amount of money belonging to the estate was received by C., the deceased executor, beyond the sums acknowledged in the account presented by his executrix, specifying various items, including one of \$15,000, received by C. within three months of his death, and "deposited by him in his own

or riot, it appeared that an action was begun in the County Court for the same cause within the three months limited by said act, in which the complaint was dismissed for want of jurisdiction in that court to entertain actions brought to recover a sum exceeding \$1,000; thereafter, this action was commenced, but after the lapse of the statutory period. *Held*, that the action was not maintainable; that as it was brought under special law and was maintainable solely by its authority, the limitation was so incorporated with the remedy given as to make it an integral part of it and was a condition precedent to the maintenance of the action at all; and that the provisions of the Code of Civil Procedure (§ 405) providing that when an action is commenced within the time limited and is terminated "in any other manner than by voluntary discontinuance, dismissal for neglect to proceed, or a final judgment on the merits, the plaintiff may commence a new action for the same cause within one year after" such determination, did not apply. (See § 414.) *Hill v. Suprs. Rens. Co.* 344

SALARY.

— *Of county treasurer of Erie county, how fixed.*
See *Suprs. Erie Co. v. Jones.* 339

SALES.

In an action to recover damages for the alleged conversion of a quantity of lumber, which had been transferred to plaintiff by the firm of G. & E. H., it appeared that said firm, having contracted to build two boats for defendant, ordered lumber of it; the order specified kinds and quantities, but no prices; the lumber was forthwith delivered, accompanied by a bill, in which the firm was described as debtors to defendant for the lumber, and the quantity, kind and price were set forth. Defendant was not required by the contract to furnish any lumber, nor were the contractors required to purchase any from it. It did not

appear there were any negotiations between the parties prior to the delivery of the lumber as to the terms and conditions on which the lumber was to be furnished. Defendant proved that it kept on hand lumber for building boats, including pieces specially shaped, which is used for that purpose, and also furnished to builders having contracts with it, but only to be used in boats built for it, and that the value of the lumber so furnished was deducted from the price of the boat in which it was used, which custom was known to G. & E. H. At the close of the evidence a motion by defendant's counsel for a nonsuit was granted. *Held*, error; that the question whether there was a bailment or a sale was for the jury. *Crosby v. Pres., etc., D. & H. C. Co.* 334

SERVICE AND PROOF OF.

Plaintiff in 1836 joined with her husband in a mortgage upon his land. In 1838 they were both made parties to a suit for the foreclosure of the mortgage. No copy of the writ of subpœna was served upon her; one was served upon the husband, and one delivered to him with the request to hand it to her; she was at the time under age. A judgment of foreclosure and sale was entered, under which the premises were sold. The husband died in 1882. In an action to recover dower, *held*, that under the rule and practice in chancery proceedings in force at the time of the foreclosure, personal service of the writ upon plaintiff was not necessary, but service on the husband was a good service on both, and this was so although she was at the time under age; and that, therefore, the action was not maintainable. *Feitner v. Lewis.* 131

SET-OFF.

1. In an action to foreclose a mortgage held by plaintiffs, as assignees for the benefit of creditors of the mortgagees, defendant M., who had purchased the premises subject to the mortgage,

sought to set off a claim against plaintiffs' assignors. It appeared that at the time of the assignment to plaintiffs, the debt secured by the mortgage was not due; that the assignors were insolvent and M. endeavored to have his debt, which was due, applied by them upon the mortgage before it was assigned. *Held*, that he was equitably entitled to the set-off; that it was not necessary that the mortgage debt should have been due, as by seeking to have the debt due him applied thereon, M. had treated it as due and so waived any defense he might have based upon the fact that it was not due; that he had a right so to do and to require the set-off. *Richards v. LaTourette*. 54

2. The distinction between this case and one where the debt owing by the insolvent to the party desiring to avail himself of the set-off is not due, pointed out. *Id.*
3. A certificate of deposit issued by the assignors, who were bankers, was part of the amount M. sought to have offset against the mortgage; this had never been presented and a demand made for its payment at the banking-house of the assignors. *Held*, that a technical demand was not necessary in a case like this, where the set-off is claimed not as a matter of law, but of equity; that the claim of set-off may be regarded as a demand, and should have relation to the time the assignment to plaintiffs was made, so far as to give form and life to the claim that the debt of the insolvents was then due. *Id.*
4. It also appeared that M., after the assignment, recovered a judgment against the assignors for the amount of his debt, whereon an execution was returned unsatisfied. *Held*, that M. did not thereby lose his right of set-off. *Id.*

SHERIFF.

A constable or sheriff in executing a certificate of a judgment of conviction issued to him as prescribed by the Code of Criminal Proceed-

ure (§§ 721, 725) is engaged in a criminal proceeding within the meaning of the act, "to reduce the number of town officers and town and county expenses," etc. (Chap. 180, Laws of 1845, as amended by chap. 455, Laws of 1847), and the fees and expenses of the officer are included in the provisions of said act (§ 26, as amended), charging the expenses of certain criminal proceedings under the grade of felony upon the town or city where the offense was committed. *People ex rel v. Suprs. West. Co.* 126

SPECIFIC PERFORMANCE.

1. In an action for specific performance of a contract for the sale of land, it appeared that the contract was executed by defendants F. and R., in whom was the title. Their wives were also made defendants. They all joined in the answer, which recites, "defendants further admit that they did promise to convey the said premises to the plaintiff," and the only issue tendered therein or litigated was that the contract in suit was induced by the fraudulent representations of plaintiff. There was no allegation that the wives were not parties to the contract, or were not bound thereby. The issue of fraud was decided against the defendants, and the judgment required their wives to join with their husbands in the conveyance directed. The defendants jointly excepted to the findings of facts and law, but none of the exceptions were directed toward said provision of the judgment. The General Term reversed that part of the judgment on the ground that the wives were not parties to the contract. *Held*, that as there was no special exception pointing out the objection, the reversal by the General Term was error. *Schoonmaker v. Bonnie*. 565
2. *It seems* that had the objection been raised on the trial, and presented by a proper exception, it would have been valid. *Id.*
3. As to whether the court has power to specifically enforce a contract

by a married woman to release her dower interest, made upon a consideration passing to her husband, when they were residents of, and the contract was made in another state, in which the common-law disabilities of married women still exists *quære*. *Id.*

STATUTES.

1. Where provisions of a statute are separate, and one is unconstitutional, while the others are valid, the latter will be sustained and the former only rejected. *Lawton v. Steele*. 226

2. Statutes changing the common law are to be strictly construed, and it will be held to be no further abrogated than the clear import of the language used in the statutes absolutely requires. *Dean v. M. E. R. Co.* 540

— Chap. 313, *Laws of 1874*.
See In re Rosenbaum, 24.
 — 1 R. S. 388.
 — Chap. 282, *Laws of 1852*.
 — § 827, chap. 410, *Laws of 1882*.
See Church of St. Monica v. Mayor, etc., 91.
 — 1 R. S. 603, § 4.
See Varnum v. Hart, 101.
 — § 12, chap. 40, *Laws of 1848*.
See Carr v. Rischer, 117.
 — Chap. 180, *Laws of 1845*.
 — § 26, chap. 455, *Laws of 1847*.
See People ex rel. v. Suprs. West. Co. 126.
 — Chap. 392, *Laws of 1883*.
See People ex rel. v. Coleman, 137.
 — § 13, chap. 140, *Laws of 1850*.
 — § 8, chap. 252, *Laws of 1884*.
See In re S. B. R. R. Co., 141.
 — § 30, tit. 22, chap. 583, *Laws of 1888*.
See Harrigan v. City of Brooklyn, 156.
 — Tit. 3, art. 4, § 28, chap. 130, *Laws of 1842*.
See People ex rel. v. Bell, 175.
 — Chap. 205, *Laws of 1887*.
See W. I. B. Co. v. Town of Attica, 204.
 — Chap. 907, *Laws of 1869*.
 — Chap. 283, *Laws of 1871*.
See Strough v. Suprs. Jeff. Co. 212.
 — § 2, chap. 317, *Laws of 1883*.
 — Chap. 141, *Laws of 1886*.
See Lawton v. Steele, 226.

— 1 R. S. 737, § 124.
See M. L. Ins. Co. v. Shipman, 324.
 — Chap. 436, *Laws of 1877*.
 — Chap. 233, *Laws of 1880*.
 — Chap. 557, *Laws of 1881*.
See Suprs. Erie Co. v. Jones, 339.
 — Chap. 428, *Laws of 1855*.
See Hill v. Suprs. Rens. Co. 344.
 — Chap. 179, *Laws of 1830*.
See Soltan v. Gerdau, 380.
 — § 37, chap. 611, *Laws of 1875*.
See Cochran v. Wiechers, 399.
 — 1 R. S. 741, §§ 13, 14.
See Akin v. Kellogg, 441.
 — § 1, chap. 341, *Laws of 1876*.
 — Chap. 321, *Laws of 1877*.
See Barter v. B. L. Ins. Co., 450.
 — 2 R. S. 137, § 4.
See Bulger v. Rosa, 459.
 — § 44, chap. 140, *Laws of 1850*.
See Donnegan v. Erhardt, 468.
 — Chap. 257, *Laws of 1886*.
See In re Roe, 509.
 — Title 10, § 10, title 18, §§ 4, 5, 36, chap. 863, *Laws of 1873*.
See People ex rel. v. Wilson, 515.
 — 1 R. S. 738, § 137.
See Strough v. Wilder, 530.
 — Chap. 537, *Laws of 1887*.
See Dean v. M. E. R. Co., 540.
 — Chap. 269, *Laws of 1880*.
See People ex rel. v. Carter, 557, 654.
 — Chap. 489, *Laws of 1888*.
See People ex rel. v. Durston, 569.

STATUTE OF FRAUDS.

1. The written memorandum of a contract required by the Statute of Frauds must contain, within itself or by reference to other writings, all the essential elements of a contract, and when it comes up to these requirements, neither party will be permitted to show that the contract was other or different than that stated. *Routledge v. Worthington Co.* 592

2. If, however, the writing is insufficient, but there has been such a performance as to take the case out of the operation of the statute, oral evidence is admissible to supply omissions and to establish what were the contractual relations of the parties. *Id.*

3. In an action to recover for certain publications sold by plaintiff to

give her a legal estate in the land, it was a legal interest and constituted property capable in equity of being sold, transferred and mortgaged by her. *Id.*

PRACTICE.

1. A respondent, in moving to dismiss an appeal on the ground that the time for appealing had expired before service of notice of appeal, stands upon a strict right and must show a strict and technical compliance with the statute on his part to entitle him to the relief sought. *Good v. Daland.* 153
2. Where an alleged copy of judgment served was a true copy except the attestation of the clerk, required by the Code of Civil Procedure (§§ 1236, 1237), which was omitted, *held*, that the paper served was not a complete copy, and the service did not initiate the running of the time limited by appealing. *Id.*
8. Where, on motion to dismiss an appeal in a case in which an interlocutory judgment had been entered on a demurrer, and so to authorize an appeal, the certificate of the court below was required (Code Civ. Pro. § 190, subd. 4), the appellant asked for leave to apply to the court below for the requisite certificate, which application was denied, *held*, that this did not preclude the appellant from thereafter making such application without leave, and on procuring the certificate from again appealing. *Id.*
4. The provision of the Code of Civil Procedure (§ 1778), declaring that, in an action against a corporation "to recover damages for the non-payment of a promissory note, or other evidence of debt for the absolute payment of money upon demand, or at a particular time, * * * unless the defendant serves with a copy of his answer or demurrer, a copy of an order of a judge directing that the issues presented by the pleadings be tried, the plaintiff may take judg-

ment, as in case of default in pleading at the expiration of twenty days" does not apply to an action wherein it is sought to charge a corporation as indorser of a promissory note; it is to be confined strictly to actions upon instruments which admit on their face an existing debt payable absolutely. *Shorer v. T. P. & P. Co.* 483

See APPEAL,
PLEADING.
TRIAL.

PRESUMPTIONS.

1. Where one bank has funds on deposit with another, the law implies a contract between them that the latter shall pay the amount standing to the credit of the former, upon and according to its drafts or order, and a failure so to pay, is a breach of contract, for which the debtor bank is legally liable. *C. N. Bank v. I. & T. N. Bank.* 195
2. In an action to recover damages for the erection, and to compel the removal, of a wharf and bridge alleged to have been unlawfully erected by defendants upon lands of plaintiffs, adjoining and under the waters of Setauket bay, in the town of Brookhaven, Long Island, plaintiffs claimed title to the land above high-water mark as descendants of F., one of the original proprietors of the town, to whom a lot including the upland adjoining the bay was allotted. It appeared that the structures in question extended above high-water mark in front of the F. lot. *Held*, that in the absence of any evidence of a reservation by the town of land above high-water mark, the presumption was that plaintiffs' title extended to that mark; and so far as said structures extended above it, they were entitled to have them removed. *Roe v. Strong.* 316
3. As to the lands under water plaintiffs claimed title under a deed from S. to B., executed in 1768, which purported to convey "a certain piece of salt thatch," the bounds of which as given included the *locus in quo*. It appeared that

plaintiffs and their predecessors in title, so far back as the memory of living witnesses extended, exercised acts of ownership by cutting thatch, leasing the right to cut to others, and in one instance brought suit against an alleged trespasser. It also appeared that, prior to 1693, the town had conveyed to a private person the land under water in the bay up to the line of and excepting that portion included in the deed to B. *Held*, that the evidence justified the presumption of a grant of the soil, and so made out a *prima facie* title in the plaintiffs; and that, therefore, a dismissal of the complaint was error. *Id.*

4. The possession of a deed by the grantee is *prima facie* evidence of delivery, when there is nothing to impeach the *bona fides* of his possession. *Strough v. Wilder.* 530

5. After the writ of certiorari was issued, the assessment-roll having been placed in the hands of the proper officer for collection, the relators paid the taxes imposed upon the property, leaving, however, with the officer a writing, stating that the taxes were paid under protest, for the reason that the assessment was excessive and that for the correction thereof, proceedings were then pending. *Held*, that in the absence of any evidence as to the circumstances under which the payment was made, the presumption was, that the payment was involuntary, and so, did not estop the relators. *People ex rel. v. Carter.* 557

6. Possession of land is always presumed to be in subordination to the true title, and one who claims to have acquired title by adverse possession must show that he or his predecessors in interest held the land in hostility to the true owner claiming the title thereto. *Doherty v. Matsell.* 646

PRINCIPAL AND AGENT.

In an action upon certain promissory notes made payable to defendant, a domestic corporation, and indorsed by L., as its president, it

appeared that the defendant had its main office in the city of New York, and, while a portion of its business was transacted and most of its purchases and sales were made in other states and countries, its principal business operations were carried on in that city, and the annual meetings of its directors were there held. L. was its president and treasurer, the general manager of all its business affairs in said city, and the only officer in attendance at its office there; he paid the current accounts of the company, indorsed checks made payable to its order, the discount of business paper and the use of its money for its purposes, and the account of the same on its cash books were daily and permitted transactions. Defendant had no cash capital, and its working capital was borrowed on the credit of the company; this was done principally by L., and mainly by the use of paper indorsed by him in its name; the evidence tended to show that this was with the knowledge and acquiescence of the directors. *Held*, that the evidence required the submission of the question of the authority of L. to bind defendant by indorsements, to the jury; and that a dismissal of the complaint on trial was error. *F. N. Bank v. N. P. Co.* 256

See BROKERS.
FACTORS.

PRIVATE WAY.

1. H., plaintiff's testator, being the owner of land upon which was a residence built for and used as a gentlemen's country seat, obtained from defendant, by purchase and grant, a right of way from said land to a public highway across the farm of the latter, over a piece of land described. The premises of H. had no other connection with the highway than the way thus granted. The land described in the grant, over which the way was granted, was, at the time, rocky and uneven, not adapted to purposes of cultivation, or for a carriage-way, until prepared for that purpose. H. prepared a road-bed, constructed thereon a

Statutes (1 R. S. 388, § 4); that plaintiff being, when the tax was imposed, unincorporated, was not a "religious society" within the meaning of the acts (Chap. 282, Laws of 1852, and § 827, chap. 410, Laws of 1882) with reference to exemptions from taxations in the city of New York, which declare that the exemption of a school-house or other seminary of learning shall not apply unless the building is "exclusively the property of a religious society;" that the words refer to a society that has been incorporated. *Church of St. Monica v. Mayor, etc.* 91

7. Plaintiff was assignee of two leases, executed by defendant, of ferries between New York city and Staten Island; it also owned a railroad which it operated in connection with said ferries. The lessees were bound simply to run their boats to the island, they being free to choose their port of arrival and departure; they agreed to pay defendant certain percentages upon the gross receipts annually. One of the leases fixed the minimum rate of ferriage at five cents per person, the other fixed no minimum rate. Plaintiff selected St. George as the port, and charges for each passenger stopping there ten cents and the same price for passengers taking the railroad to other places, of which it allowed five cents for ferriage. The city had knowledge of this, its commissioner of accounts having investigated plaintiff's books of receipts, ascertained the division made, assented to the basis adopted and thereafter accepted the percentages founded upon that division. In an action to restrain the city from declaring the leases forfeited because of plaintiff's refusal to pay the percentage upon its entire gross receipts, *held*, that plaintiff was entitled to the relief sought; that the fact that one sum was paid for passage over the ferry and railroad did not make the whole ferry receipts, and plaintiff was not bound to pay the city anything on account of its railroad fares; that the reduction of ferriage to passengers taking the railroad was not violative of the leases; that if plaintiff has made a wrong

discrimination among its passengers, it is a public wrong, and not one to the city as lessor; and that the only question was what have been in truth and in fact the actual ferry receipts, not what they ought to or might have been. *S. I. R. T. R. R. Co. v. Mayor, etc.* 96

8. The relator, a member of the police force of the city of New York, was dismissed therefrom upon a charge of "conduct unbecoming an officer;" the specification was, that at a named date and place, he was so much under the influence of liquor as to be unfit for duty. It appeared that the relator had served on the police force fifteen years, during which time his record had been in every way excellent and he had drunk no intoxicating liquor. On the occasion in question he had been on duty during a strike of street-car drivers, who resisted the running of the cars. For five days he was continuously employed in guarding the cars and repelling attacks upon them. On the morning of the fifth day, which was severely cold, he was ordered out without opportunity to get his breakfast and detailed to guard moving cars; he rode upon the front platforms of such cars until the middle of the afternoon, when he became faint and ill. Upon reporting his illness to the sergeant, the latter took him off the cars and advised him to report sick, but the relator persisted in remaining on duty. Later he took one drink of brandy and peppermint to relieve his illness and the surgeon who saw him at eight o'clock testified that his breath smelled slightly of liquor; that he could walk steadily, and talk coherently, his speech being a little thick; that in his opinion he had been drinking, but was not then intoxicated. The relator was on these facts dismissed from the force. *Held* (RUGER, Ch. J. and GRAY, J. dissenting), that the dismissal was error; that the evidence failed to show any breach of discipline by the relator, or conduct unbecoming an officer; and that, therefore, as the facts admitted of no inference of guilt, of conscious breach of discipline or violation of

rule, the case presented a question of law reviewable by the General Term on certiorari, and also reviewable here. *People ex rel. v. French.* 493

9. The relator, a member of the police force of the city of New York, was dismissed from the force for intoxication. It appeared, that on October fifteenth, he was on duty until five o'clock in the afternoon, when he went home, and after moving his furniture to another house, again went on duty, and during the night came home, settled his house and went to bed. He went on duty at eight o'clock the next morning, and just before that hour, not having had any breakfast, his wife procured some brandy, which, as she alleged, fearing he would be sick, she insisted upon his drinking. After doing so, he went upon duty, and while at his post, between twelve and one o'clock, his wife, still fearing he would be sick, took him more brandy which he drank. About half past one, he went to the station-house, fell down on the floor and was found there intoxicated. It did not appear that he had been advised by any physician to take the brandy for any ailment, or that he had any physical ailment, except he testified that he was sometimes dizzy-headed. It appeared that the relator had been on the force many years and had always before been a sober and faithful officer. *Held*, that the evidence was sufficient to sustain the charge and to authorize the inference that the intoxication was voluntary and blamable; that the fact that relator's wife advised him to drink the brandy did not relieve him from responsibility; and that the exercise of discretion by the commissioners, as to the extent of the punishment, was not reviewable here. *People ex rel. v. French.* 502

10. The members of the police force of the city of New York have a permanent tenure of office and cannot be dismissed until after charges have been preferred, examined, heard and investigated, as provided by the statutes and the rules

adopted by the board of police commissioners. *Id.*

11. *It seems*, that before a police officer can be dismissed from the force for intoxication, it must be shown that the intoxication was of such a character as made it an offense against the rules; *i. e.*, that it was conscious, voluntary, blamable, and in some way due to the officer's fault. *Id.*

12. In the absence of any proof or explanation, the mere fact of intoxication may establish the offense. *Id.*

13. *It seems*, also, that in determining the guilt of a police officer, the police commissioners may not act upon their own knowledge, the charges must be tried and the guilt established on evidence; but in inflicting punishment, they may take into consideration both the evidence and their knowledge of the officer. *Id.*

NEXT OF KIN.

See LEGATEES, NEXT OF KIN, HEIRS AND DEVISEES.

NON-RESIDENTS.

1. The provision of the act of 1883 (Chap. 392, Laws of 1883), declaring that "All debts and obligations for the payment of money due or owing to persons residing within this state * * * wherever such securities shall be held, shall be deemed, for the purpose of taxation, personal property within this state, and shall be assessed as such to the owner or owners," refers to debts or obligations which are solely due or owing to the residents of this state; it does not include as owners persons who are trustees only, and while under the old law if a trustee residing here has possession of such securities he may be assessed for them as a trustee in possession, even if there be other trustees non-residents, the resident trustee may not be assessed for securities not held by him and not within this state, but

which are in the possession of one of the non-resident trustees. *People ex rel. v. Coleman.* 137

2. Accordingly, *held*, where two of three co-trustees resided in this state, and the other resided in another state, the beneficiaries also being non-residents, that an assessment of securities in the hands of the non-resident trustee was void. *Id.*

NOTICE.

1. Actual possession of real estate is sufficient notice to all the world of the existence of any right which the person in possession is able to establish. *Phelan v. Brady.* 587
2. In an action brought to foreclose a mortgage upon certain premises given by M., who held an apparently perfect record title to the same, it appeared that before the execution of the mortgage, M. had conveyed the premises to B., who was in possession, and, with her husband occupied two rooms in the buildings on the premises; he also kept a liquor store in a part thereof; the other rooms she leased to various tenants, claiming to be the owner, and she collected the rents. Her deed was not recorded until after the giving of the mortgage. *Held*, that B.'s actual possession under her deed, although unrecorded, and its existence unknown to plaintiff, was sufficient notice to him of her rights to defeat any claim under the mortgage. *Id.*

NUISANCE.

1. The state legislature has power to declare places or property used to the detriment of public interests or the injury of the health, morals or welfare of the community, public nuisances, although not such at common law. *Lawton v. Steele.* 226
2. *It seems*, however, that this power may not be used as a cover for withdrawing property from the protection of the law, or arbitrarily, where no public right or in-

terest is involved in declaring property a nuisance for the purpose of devoting it to destruction, and if the court can judicially see that the statute is a mere evasion or was framed for the purpose of individual oppression, it may be set aside as unconstitutional. *Id.*

3. The legislature has power to regulate and control the right of fishing in the public waters of the state, and in the exercise of this power may prohibit the taking of fish with nets in specified waters, and by its declaration, make the setting of nets for that purpose a public nuisance. *Id.*
4. Where a public nuisance consists in the location or use of tangible personal property, so as to interfere with or obstruct a public right or regulation, the legislature may authorize its summary abatement by executive agencies without resorting to judicial proceedings; and any injury to or destruction of the property necessarily incident to the exercise of the summary jurisdiction, interferes with no legal right of the owner, and is not violative of the constitutional prohibition against depriving the owner of his property without due process of law. *Id.*
5. The legislature, however, may not decree the destruction or forfeiture of property used so as to constitute a nuisance, and appoint officers to execute its mandate as a punishment of the wrong or even to prevent a future illegal use of the property, it not being a nuisance *per se.* *Id.*
6. *It seems* a public nuisance may only be abated by an individual where it obstructs his private rights, or interferes at the time with his enjoyment of a right common to many, and he thereby sustains a special injury. *Id.*
7. Accordingly, *held*, that the provision of the act of 1883 (§ 2, Laws of 1883, chap. 317), declaring "any net found * * * in or upon any of the waters of this state, or upon the shores or islands in any waters in this state, in vio-

lation of any existing or hereafter enacted statutes or laws for the protection of fish," to be a nuisance, authorizing its summary abatement and destruction by any person, and making it the duty of every fish protector and constable "to seize and remove and forthwith destroy the same," so far as it authorizes the destruction, by a fish protector or constable, of nets found in actual use in the waters of the state, was constitutional; and that its constitutionality was not affected by the authorization also given to private individuals and officers to destroy nets on land. *Id.*

OFFICE AND OFFICER.

Inspectors of election are simply ministerial officers, and a board of inspectors has no discretionary power to reject the vote of a person who, upon being challenged and upon application of the statutory tests, has shown himself qualified to vote. When this is done the offered vote in legal contemplation is finally received, and must be deposited. *People ex rel. v. Bell.* 75

PARTIES.

Question as to non-joinder of parties where alleged defect appears in complaint and is not raised by demurrer, is waived and cannot be raised on trial. *Sullivan v. N. Y. & R. C. Co.* 848

— *When action properly brought for benefit of a town by its supervisor in his name as such officer.*

See Strough v. Suprs. Jeff. Co. 212

PARTNERSHIP.

1. *It seems* an insolvent firm may not apply the firm assets in payment of the individual debts of the partners, nor can the equity of the firm creditors be defeated by a transfer by one of the two copartners, of his interest therein, to the other; they still, as to firm creditors remain firm assets. *Bulger v. Rosa.* 459

2. *It seems*, also, where an individual creditor of one of the members of a firm knowingly takes a transfer of firm property in payment of his individual debt, his act is not merely a violation of an equitable right of a firm creditor, but it constitutes a fraud. *Id.*

3. A firm, although insolvent, has a right, however, to make preferences among its creditors, and one partner may transfer the partnership effects directly to a firm creditor in payment of his debt without the knowledge or consent of his copartner. *Id.*

4. Where S. one of two copartners in a firm which to their knowledge was insolvent, as were also the individual members, assigned and transferred his interest in the partnership assets to B. his copartner, subject to the firm's debts, with the knowledge that the latter intended to transfer them to a firm and individual creditor, which transfer was made in payment of all the creditor's claims, and where in an action of replevin against a sheriff, who had levied upon the property under an execution in favor of a firm judgment creditor, the evidence as to value of the property transferred was conflicting, there being evidence tending to show, and from which the jury would have been authorized to find, that such value was not more than the claim of the transferee against the firm, and, that the object of S. in transferring his interest, was that the property should be used to pay the firm debt, *held*, the fact that the individual debts were named as part of the consideration, was not conclusive evidence of fraud; that the question of fraud in the transfer was one of fact for the jury; and that, therefore, a direction of a verdict for defendant was error. *Id.*

PAYMENT INTO COURT.

1. Under the provision of the Code of Civil Procedure in reference to tender (§ 731) and payment into court of the money tendered, in case of refusal to accept (§ 732)

when the money is so brought into court, it belongs to plaintiff, and his title thereto cannot be disputed, whatever may be the result of the action. *Taylor v. B. E. R. R. Co.* 561

2. The plaintiff, in proceeding after a tender and deposit, simply runs the risk of paying defendant's costs, if the recovery falls short of the amount tendered, while the defendant takes the risk of losing the amount tendered, in the event of his succeeding in the action. *Id.*

PENSIONS.

1. Under the provision of the Code of Civil Procedure (§ 1393) exempting pensions granted by the United States or a state for military or naval services from levy and sale on execution, where the receipts from a pension can be directly traced to the purchase of property necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt. *Y. C. N. Bank v. Carpenter.* 550
2. Where, therefore, a pensioner who had a wife and family purchased a house and lot for a home, paying a portion of the purchase-price out of the proceeds of a pension certificate, and giving a mortgage on the premises to secure the balance, *held*, that the premises were exempt from levy and sale on execution. *Id.*
3. *It seems* that where pension moneys have been embarked in business and mingled with other funds so as to be incapable of identification or separation, the pensioner loses the benefit of the exemption. *Id.*

PHYSICIANS AND SURGEONS.

Upon trial of a criminal action, physicians who had been sent to the jail by the district attorney to make an examination of the prisoner were permitted to testify, as witnesses for the prosecution, to his mental condition, under the objection that either the relation of

patient and physician existed, or else the prisoner was compelled to furnish evidence against himself. *Held*, no error; no evidence having been called for as to the prisoner's statements or as to transactions in the jail. *People v. Kemmler.* 580

PLEADING.

1. Plaintiff's complaint alleged, in substance, the making and delivery by it to W. & Co. of certain drafts, which were set forth, drawn upon defendant, with whom it had sufficient funds on deposit to pay the drafts, and made payable to the order of W. & Co., the indorsement of the drafts by the payees, a presentation and demand for payment, defendant's refusal to pay and protest for non-payment, and that, by reason of the non-payment, plaintiff was compelled to pay the amount of the drafts and take them up. The answer set up simply payment. *Held*, that while the complaint was technically open to criticism, yet it contained a plain statement of the facts from which, as a legal conclusion, plaintiff had a right to recover for a breach of defendant's implied contract to pay out plaintiff's funds, and as defendant could in nowise have been misled a recovery for that cause of action was proper. *C. N. Bank. v. I. & T. N. Bank.* 195
2. *It seems*, the averment that plaintiff repaid the money received for the drafts and took them up, was immaterial to establish a cause of action; the repayment simply established the amount of damages. *Id.*
3. It appeared that W. & Co. purchased from plaintiffs the drafts, which, after indorsing, they delivered to their bookkeeper to be forwarded to certain of their creditors. The bookkeeper erased the indorsements, forged others and used the drafts for his own purposes; they were finally presented by another bank to and paid by defendant. After the forgeries were discovered, and upon the return of the drafts to plaintiff, W. & Co. demanded and

obtained them, and on presentation defendant refused payment on the ground that they had been paid. Plaintiff repaid to W. & Co. the amount paid for them. Defendant offered to prove that before plaintiff paid back to W. & Co. the amount of the dishonored drafts, that firm had settled with their bookkeeper, and for his indebtedness to them, including the appropriation of the drafts, had received certain property. This was objected to and excluded. *Held*, no error; that this evidence was not admissible under the pleadings; also, if an answer had been allowed, it would not have shown that W. & Co. had been paid. *Id.*

4. Where after trial and a decision adverse to plaintiff in an action in which a receiver *pendente lite* had been appointed, but before judgment, an order was granted continuing the receivership until after the decision of any appeal from the judgment, *held*, that the receiver had no authority after the entry of judgment to bring an action to recover a claim, a part of the assets in his hands as receiver; and where the facts appeared in the complaint in such an action, that it was a good ground for a demurrer. *Colwell v. G. N. Bank.* 409

5. In an action brought by plaintiff, as receiver of the P. H. S. & I. Co., the complaint alleged in substance that said company executed to defendant's firm chattel mortgages on all its property, consisting of buildings, machinery, tools, etc.; that default having been made in payment, defendants took possession of the property and sold it at auction, they bidding it in for \$1,000; that none of the property was in view of the persons attending the sale; that it was all put up in a lump and sold together at the request of defendants, although they knew it could be sold in parcels, and greater sums realized for it if so sold; that none of the company's officers were present; that since the sale defendants have claimed to own the property and have sold \$10,000 or

\$15,000 of it; that at the time of the sale the property was worth about \$60,000, and the company's indebtedness to defendants did not exceed \$20,000. The relief asked was that defendants be required to account for the value of the property, and after application of sufficient to extinguish the debt secured that plaintiffs have judgment for the balance. A demurrer to the complaint was sustained because of the omission of an averment of a tender to defendants of the amount conceded to be due and unpaid on the mortgages, or an offer to pay that amount on its being ascertained. *Held*, error; that the sale to defendants was voidable and could be vacated and set aside as part of the relief in this action; that the amount received by defendants on the sales made by them was applicable and must be deemed to have been applied upon the mortgages, and the property remaining in their hands to be held as security for the balance due; that a tender before suit, or an offer in the complaint to pay was not necessary and the omission thereof was only important as bearing upon the question of costs; that the facts alleged in the complaint were sufficient to show a right of redemption in plaintiff, and the action should be treated as one to redeem and for such incidental relief as is necessary to accomplish the redemption. *Cassery v. Witherbee.* 522

— Question as to non-joinder of parties where alleged defect appears in complaint and is not raised by demurrer, is waived and cannot be raised on trial.

See *Sullivan v. N. Y. & R. C. Co.* 348

POLICE.

1. The relator, a member of the police force of the city of New York, was dismissed therefrom upon a charge of "conduct unbecoming an officer;" the specification was, that at a named date and place, he was so much under the influence of liquor as to be unfit for duty. It appeared that the relator had

served on the police force fifteen years, during which time his record had been in every way excellent, and he had drank no intoxicating liquor. On the occasion in question he had been on duty during a strike of street-car drivers, who resisted the running of the cars. For five days he was continuously employed in guarding the cars and repelling attacks upon them. On the morning of the fifth day, which was severely cold, he was ordered out without opportunity to get his breakfast and detailed to guard moving cars; he rode upon the front platforms of such cars until the middle of the afternoon, when he became faint and ill. Upon reporting his illness to the sergeant, the latter took him off the cars and advised him to report sick, but the relator persisted in remaining on duty. Later he took one drink of brandy and peppermint to relieve his illness and the surgeon who saw him at eight o'clock testified that his breath smelled slightly of liquor; that he could walk steadily and talk coherently, his speech being a little thick; that in his opinion he had been drinking, but was not then intoxicated. The relator was on these facts dismissed from the force. *Held* (RUGER, Ch. J. and GRAY, J. dissenting), that the dismissal was error; that the evidence failed to show any breach of discipline by the relator, or conduct unbecoming an officer; and that, therefore, as the facts admitted of no inference of guilt, of conscious breach of discipline or violation of rule, the case presented a question of law reviewable by the General Term on certiorari, and also reviewable here. *People ex rel. v. French.* 493

2. The relator, a member of the police force of the city of New York, was dismissed from the force for intoxication. It appeared, that on October fifteenth, he was on duty until five o'clock in the afternoon, when he went home, and after moving his furniture to another house, again went on duty, and during the night came home, settled his house and went to bed. He went on duty at eight o'clock the next morning, and just before

that hour, not having had any breakfast, his wife procured some brandy, which, as she alleged, fearing he would be sick, she insisted upon his drinking. After doing so, he went upon duty, and while at his post, between twelve and one o'clock, his wife, still fearing he would be sick, took him more brandy, which he drank. About half past one, he went to the station-house, fell down on the floor and was found there intoxicated. It did not appear that he had been advised by any physician to take the brandy for any ailment, or that he had any physical ailment, except he testified that he was sometimes dizzy-headed. It appeared that the relator had been on the force many years and had always before been a sober and faithful officer. *Held*, that the evidence was sufficient to sustain the charge and to authorize the inference that the intoxication was voluntary and blamable; that the fact that relator's wife advised him to drink the brandy did not relieve him from responsibility; and the exercise of discretion by the commissioners, as to the extent of the punishment, was not reviewable here. *People ex rel. v. French.* 502

3. The members of the police force of the city of New York have a permanent tenure of office and cannot be dismissed until after charges have been preferred, examined, heard and investigated, as provided by the statutes and rules adopted by the board of police commissioners. *Id.*
4. *It seems*, that before a police officer can be dismissed from the force for intoxication, it must be shown that the intoxication was of such a character as made it an offense against the rules, *i. e.*, that it was conscious, voluntary, blamable, and in some way due to the officer's fault. *Id.*
5. In the absence of any proof or explanation, the mere fact of intoxication may establish the offense. *Id.*
6. *It seems*, also, that in determining the guilt of a police officer, the

police commissioners may not act upon their own knowledge, the charges must be tried and the guilt established on evidence; but in inflicting punishment, they may take into consideration both the evidence and their knowledge of the officer. *Id.*

POSSESSION.

1. Actual possession of real estate is sufficient notice to all the world of the existence of any right which the person in possession is able to establish. *Phelan v. Brady.* 587
2. In an action brought to foreclose a mortgage upon certain premises given by M., who held an apparently perfect record title to the same, it appeared that before the execution of the mortgage, M. had conveyed the premises to B. who was in possession, and, with her husband occupied two rooms in the buildings on the premises; he also kept a liquor store in a part thereof; the other rooms she leased to various tenants, claiming to be owner, and she collected the rents. Her deed was not recorded until after the giving of the mortgage. *Held*, that B.'s actual possession under her deed, although unrecorded, and its existence unknown to the plaintiff, was sufficient notice to him of her rights to defeat any claim under the mortgage. *Id.*
3. Also, *held*, that the fact that B. and her husband occupied the store and a living apartment in the building prior to the time she went in possession under her contract of purchase could not aid the plaintiff. *Id.*

See ADVERSE POSSESSION.

POWERS.

1. The provision of the Revised Statutes (1 R. S. 737, § 124), declaring that "every instrument executed by the grantee of a power, conveying an estate, or creating a charge which such grantee would

have no other right to convey or create, unless by virtue of his power, shall be deemed a valid execution of the power, although such power be not recited or referred to therein," was not intended to change then existing rules; and whenever, in addition to the power, the grantee has an independent interest in the property, whether legal or equitable, the rule of the statute does not apply, and the instrument will not be deemed an execution of the power, but only a conveyance of the independent interest. *M. L. I. Co. v. Shipman.* 324

2. The will of S. devised his real estate to his wife as long as she should remain his widow, and upon her death or remarriage, to their children. He made her executrix, and the will authorized her to make advances from the property, from time to time, in her discretion, to the children "for maintenance and support," and empowered her to mortgage, lease and dispose of such property for the purpose of carrying into effect the provisions of the will. The widow married and subsequently executed a mortgage on said real estate in her individual name to secure a loan. The mortgage contained no reference to the character of the mortgagor as executrix, or to the power to mortgage contained in the will. This mortgage was paid from the proceeds of a loan obtained from plaintiff upon a mortgage of the same property, executed by the widow individually and as executrix. In an action to foreclose the latter mortgage, it appeared that plaintiff had knowledge that the purpose of the mortgagor was to pay the prior loan with the money borrowed; such prior loan was procured for the benefit of the widow's second husband. *Held*, that upon the marriage of the widow the fee of the real estate vested in the children, subject to the execution of the power of sale and to the widow's right of dower; that the interest mortgaged must be restricted to the individual interest which the mortgagor had as doweress; that although her dower right while unassigned did not

give her a legal estate in the land, it was a legal interest and constituted property capable in equity of being sold, transferred and mortgaged by her. *Id.*

PRACTICE.

1. A respondent, in moving to dismiss an appeal on the ground that the time for appealing had expired before service of notice of appeal, stands upon a strict right and must show a strict and technical compliance with the statute on his part to entitle him to the relief sought. *Good v. Daland.* 153
2. Where an alleged copy of judgment served was a true copy except the attestation of the clerk, required by the Code of Civil Procedure (§§ 1236, 1237), which was omitted, *held*, that the paper served was not a complete copy, and the service did not initiate the running of the time limited by appealing. *Id.*
3. Where, on motion to dismiss an appeal in a case in which an interlocutory judgment had been entered on a demurrer, and so to authorize an appeal, the certificate of the court below was required (Code Civ. Pro. § 190, subd. 4), the appellant asked for leave to apply to the court below for the requisite certificate, which application was denied, *held*, that this did not preclude the appellant from thereafter making such application without leave, and on procuring the certificate from again appealing. *Id.*
4. The provision of the Code of Civil Procedure (§ 1778), declaring that, in an action against a corporation "to recover damages for the non-payment of a promissory note, or other evidence of debt for the absolute payment of money upon demand, or at a particular time, * * * unless the defendant serves with a copy of his answer or demurrer, a copy of an order of a judge directing that the issues presented by the pleadings be tried, the plaintiff may take judg-

ment, as in case of default in pleading at the expiration of twenty days" does not apply to an action wherein it is sought to charge a corporation as indorser of a promissory note; it is to be confined strictly to actions upon instruments which admit on their face an existing debt payable absolutely. *Shorer v. T. P. & P. Co.* 483

See APPEAL,
PLEADING.
TRIAL.

PRESUMPTIONS.

1. Where one bank has funds on deposit with another, the law implies a contract between them that the latter shall pay the amount standing to the credit of the former, upon and according to its drafts or order, and a failure so to pay, is a breach of contract, for which the debtor bank is legally liable. *C. N. Bank v. I. & T. N. Bank.* 195
2. In an action to recover damages for the erection, and to compel the removal, of a wharf and bridge alleged to have been unlawfully erected by defendants upon lands of plaintiffs, adjoining and under the waters of Setauket bay, in the town of Brookhaven, Long Island, plaintiffs claimed title to the land above high-water mark as descendants of F., one of the original proprietors of the town, to whom a lot including the upland adjoining the bay was allotted. It appeared that the structures in question extended above high-water mark in front of the F. lot. *Held*, that in the absence of any evidence of a reservation by the town of land above high-water mark, the presumption was that plaintiffs' title extended to that mark; and so far as said structures extended above it, they were entitled to have them removed. *Roe v. Strong.* 316
3. As to the lands under water plaintiffs claimed title under a deed from S. to B., executed in 1768, which purported to convey "a certain piece of salt thatch," the bounds of which as given included the *locus in quo*. It appeared that

plaintiffs and their predecessors in title, so far back as the memory of living witnesses extended, exercised acts of ownership by cutting thatch, leasing the right to cut to others, and in one instance brought suit against an alleged trespasser. It also appeared that, prior to 1693, the town had conveyed to a private person the land under water in the bay up to the line of and excepting that portion included in the deed to B. *Held*, that the evidence justified the presumption of a grant of the soil, and so made out a *prima facie* title in the plaintiffs; and that, therefore, a dismissal of the complaint was error. *Id.*

4. The possession of a deed by the grantee is *prima facie* evidence of delivery, when there is nothing to impeach the *bona fides* of his possession. *Strough v. Wilder.* 530

5. After the writ of certiorari was issued, the assessment-roll having been placed in the hands of the proper officer for collection, the relators paid the taxes imposed upon the property, leaving, however, with the officer a writing, stating that the taxes were paid under protest, for the reason that the assessment was excessive and that for the correction thereof, proceedings were then pending. *Held*, that in the absence of any evidence as to the circumstances under which the payment was made, the presumption was, that the payment was involuntary, and so, did not estop the relators. *People ex rel. v. Carter.* 557

6. Possession of land is always presumed to be in subordination to the true title, and one who claims to have acquired title by adverse possession must show that he or his predecessors in interest held the land in hostility to the true owner claiming the title thereto. *Doherty v. Matsell.* 646

PRINCIPAL AND AGENT.

In an action upon certain promissory notes made payable to defendant, a domestic corporation, and indorsed by L., as its president, it

appeared that the defendant had its main office in the city of New York, and, while a portion of its business was transacted and most of its purchases and sales were made in other states and countries, its principal business operations were carried on in that city, and the annual meetings of its directors were there held. L. was its president and treasurer, the general manager of all its business affairs in said city, and the only officer in attendance at its office there; he paid the current accounts of the company, indorsed checks made payable to its order, the discount of business paper and the use of its money for its purposes, and the account of the same on its cash books were daily and permitted transactions. Defendant had no cash capital, and its working capital was borrowed on the credit of the company; this was done principally by L., and mainly by the use of paper indorsed by him in its name; the evidence tended to show that this was with the knowledge and acquiescence of the directors. *Held*, that the evidence required the submission of the question of the authority of L. to bind defendant by indorsements, to the jury; and that a dismissal of the complaint on trial was error. *F. N. Bank v. N. P. Co.* 256

See BROKERS.
FACTORS.

PRIVATE WAY.

1. H., plaintiff's testator, being the owner of land upon which was a residence built for and used as a gentlemen's country seat, obtained from defendant, by purchase and grant, a right of way from said land to a public highway across the farm of the latter, over a piece of land described. The premises of H. had no other connection with the highway than the way thus granted. The land described in the grant, over which the way was granted, was, at the time, rocky and uneven, not adapted to purposes of cultivation, or for a carriage-way, until prepared for that purpose. H. prepared a road-bed, constructed thereon a

carriage-way, fences were built on both sides, with openings on either side, so that defendant might cross the road. Defendant thereafter used the road-way for carrying heavy loads of farm produce and utensils over it, thus injuring the road, and also placed stones thereon which obstructed the passage, and he threatened to continue such use whenever he deemed necessary. *Held*, that plaintiff was entitled to an injunction to restrain such improper use of the way; that the grant gave plaintiff, not only a right to an unobstructed passage at all times over the land marked out for the way, but also all such rights as were incident or necessary to such passage; that plaintiff thus acquired the right to enter upon the land and construct such road as he desired, and to restrict such use of it by the owner of the servient tenement, as was inconsistent with the full and unrestricted enjoyment of his easement; that the full extent of the rights of the grantor was to enter upon the land and do such acts only as should not injure or impair the usefulness of the road so constructed, or its character as a carriage road for private use; also, that the grantee had a right, not only to a free passage over the traveled part, but also over the whole strip granted and enclosed as a way; and that the deposit of stones or other obstructions on any part of the enclosure, in such a way as to interrupt the enjoyment of the easement, was inconsistent with and an infringement upon the grantee's rights, and could properly be prevented by injunction. *Herman v. Roberts*.

87

2. But *held*, defendant was not precluded from the use of the road-way, by passing over or across it in such a manner as not materially to obstruct passage or injure the road-bed. *Id.*
3. In considering the extent of the rights of the respective parties in the grant of a right of way, it is not proper to refer to the parol negotiations which preceded or accompanied its execution, but

the language of the grant should be regarded, and, when that is uncertain or ambiguous, the circumstances surrounding it, and the situation of the parties, with a view of arriving at the true intent of the parties. *Id.*

PRIVILEGED COMMUNICATIONS.

Upon trial of a criminal action, physicians who have been sent to the jail by the district attorney to make an examination of the prisoner were permitted to testify, as witnesses for the prosecution, to his mental condition, under the objection that either the relation of patient and physician existed, or else the prisoner was compelled to furnish evidence against himself. *Held*, no error; no evidence having been called for as to the prisoner's statements or as to transactions in the jail. *People v. Kemmler*. 580

PUNISHMENT.

1. The provisions of the Code of Criminal Procedure (§§ 491, 492, 503, 504, 505, 506, 507, 508 and 509, as amended by chap. 489, Laws of 1888) changing the mode of inflicting the death penalty, do not upon their face, nor in their general purpose and intent, violate any provision of the Constitution. *People ex rel. v. Durston*. 569
2. *It seems*, that under the provision of the state Constitution (Art. 1, § 5) forbidding the infliction of cruel and unusual punishments, the courts have power to declare void any legislative acts prescribing punishment for crime in fact cruel and unusual. *Id.*
3. The legislature, however, has power to change the manner of inflicting the death penalty; this is not a change of punishment, but simply of the mode. *Id.*
4. Whether the use of electricity as an agency for producing death constituted a more humane method of execution than that formally used was a question for the legislature, and its determination in regard thereto is conclusive. *Id.*

QUESTIONS OF LAW AND FACT.

—When question of negligence one of fact.

See *Weil v. D. D., E. B. & B. R. Co.* 147

See *Ouderkirk v. C. N. Bank.* 263

—When question of negligence one of law.

See *Dobbins v. Brown.* 188

See *Larkin v. O'Neill.* 221

See *Danaher v. City of Brooklyn.* 241

—When question as to authority of officer of corporation to indorse and transfer notes made payable to it one of fact.

See *F. N. Bank v. N. P. Co.* 250

—When question as to waiver of conditions on policy of life insurance one of fact for jury.

See *Wyman v. P. M. L. Ins. Co.* 274

—When question as to whether a transaction amounted to a bailment or sale one of fact for jury.

See *Crosby v. President, etc., D. & H. C. Co.* 334

—When the evidence in proceedings against an officer of the police force of New York city, charged with "conduct unbecoming an officer," fails to show any breach of discipline or conduct unbecoming an officer, the case presents a question of law reviewable by the General Term on certiorari, and also reviewable here.

See *People ex rel. v. French.* 493

RAILROAD CORPORATIONS.

1. Under the provision of the General Railroad Act of 1850 (§ 13, chap. 140, Laws of 1850), which authorizes a corporation organized under it to obtain, by condemnation, such lands as are "required for the purposes of its incorporation," only such and so much land may be condemned as the proper execution of the corporate purposes shall require and render necessary. *In re S. B. R. R. Co.* 141

2. Under the provision of the Street Railroad Act of 1884 (§ 3, chap.

252, Laws of 1884), giving to a corporation organized under it the right to construct its road "through, along and upon any private property which said company may require for the purpose," and giving it the powers and privileges granted to corporations organized under the General Railroad Act, conceding that a street railroad corporation has power to condemn lands of a private owner in some cases and for some purposes, as to which *quære*, the purposes are those, and those only, which the law of its organization describes and defines, and which are certified to in its articles of association; those purposes are limited to the construction of a street surface railroad. *Id.*

3. Where, therefore, the articles of association of a corporation organized under the Street Railroad Act, stated its purpose to be to construct and operate a street surface railroad through certain specified avenues in the village of E., and the corporation subsequently filed a map of its intended route, which was not along the specified streets, but was located upon private property outside of the streets for nearly the whole distance, *held*, the corporation had no right to condemn the lands upon which the proposed route was located, as they were not required for the purposes of its incorporation; that while a right to change the specified route might exist, this did not authorize a change which involved not only a contradiction and violation of the articles of association, but also of the character and quality of the corporation. *Id.*

4. In an action to recover damages for injuries alleged to have been caused by defendant's negligence, plaintiff's evidence was to this effect: Plaintiff, a child two years of age, lived with her parents on the first floor of a building fronting on a street twenty-six feet wide from curb to curb, through which defendant's road runs; her father carried on the bakery business on the same floor. Plaintiff was with her father in the store,

- the door of which, on account of the heat, was left open. She went behind the counter, and while he supposed she still remained there she escaped into the street and was run over by one of defendant's cars. She had been out of her father's sight not more than two minutes. Plaintiff was nonsuited on the ground that her parents were negligent in omitting to exercise a proper degree of care and watchfulness. *Held*, error; that the question was one of fact for the jury. *Weil v. D. D., E. B. & B. R. R. Co.* 147
5. A railroad corporation, for the safety of its passengers as well as its employes, is bound to use suitable care and skill in furnishing not only adequate engines and cars, but also a safe and proper track and road-bed. The track must be properly laid, the road-bed properly constructed, and reasonable prudence and care exercised in keeping the track free from obstructions, animate and inanimate, and if, from want of proper care, such obstructions are permitted to be, or to come upon the track, and a train is thereby wrecked, the corporation is responsible for injuries received by any person thereon, whether passenger or employe. *Donnegan v. Erhardt.* 468
 6. In an action to recover damages for injuries received by plaintiff, who was a brakeman in the employ of defendant, it appeared that the injuries were caused by a collision in the night-time between the train upon which plaintiff was employed and a horse which plaintiff claimed came upon the track through defendant's negligence in permitting the fence along its road to become out of repair. The case was submitted to the jury, with instructions that if the horse came upon the track through a fence which defendant was bound to maintain and keep in repair, and which was negligently permitted to be out of repair, plaintiff could recover. *Held*, no error. *Id.*
 7. Under the provisions of the General Railroad Act (§ 44, chap. 140, Laws of 1850), requiring railroad corporations to build and keep in repair fences on the sides of their roads, and providing that they "shall be liable for damages which shall be done * * * to any cattle, horses, sheep or hogs thereon," an absolute duty is imposed upon said corporations to fence their tracks, not simply to protect the lives of animals, but also to protect persons upon their trains, and for violation of said statutory duty, causing injury, such a corporation is liable. *Id.*
 8. *It seems* that, independent of the statute, a jury may find that it is the duty of a railroad company to fence its track to guard against such dangers. *Id.*
 9. In an action against a railroad corporation to recover damages because of its interfering with plaintiff's rights in a street adjoining his premises, plaintiff is not entitled to a recovery for permanent diminution in value of the premises; but only damages sustained prior to the commencement of the action. *Ottenot v. N. Y., L. & W. R. Co.* 603
- *As to sufficiency of evidence of plaintiff's title in action against a railroad corporation to recover damages for alleged unlawful construction and operation of road in street in front of plaintiff's premises.*
See Dean v. M. E. R. Co. 540
- ### REAL PROPERTY.
1. Oil in the earth belongs to the owner of the land, and when unlawfully taken therefrom by a wrong doer the title of such owner remains perfect, and he may pursue and reclaim the property wherever he may find it. *Hughes v. U. P. Lines.* 423
 2. Actual possession of real estate is sufficient notice to all the world of the existence of any right which the person in possession is able to establish. *Phelan v. Brady.* 587
 3. Possession of land is always presumed to be in subordination to the true title, and one who claims

to have acquired title by adverse possession must show that he or his predecessors in interest held the land in hostility to the true owner claiming the title thereto. *Doherty v. Mastell.* 646

RECEIVER.

1. In 1887 plaintiff, with other corporations engaged in the manufacturing of carbon, entered into a contract with H., the object of which was, by a combination, to vest in H., as a common trustee, the management and control of the business of manufacturing and selling their products. The several companies agreed to lease to such trustee their respective factories, and operate them under his direction. He was to designate the kind of goods to be manufactured, fix the prices at which and the persons to whom they should be sold, and, after paying expenses, divide the net proceeds and profits as provided in the contract. When this contract was made plaintiff had an outstanding contract to furnish carbons to the B. E. L. Co. from time to time. Plaintiff assigned to H., as such trustee, all existing contracts, and he assumed their performance. Carbons manufactured at plaintiff's factory in April, May and June, 1887, were billed in the name of H., and delivered under said contract to the B. E. L. Co. About July, 1887, plaintiff refused to continue in the combination, and an action was commenced against the trustee and the contracting corporations to dissolve the same, which resulted in the appointment of defendant as receiver of its property. In an action brought by plaintiff to recover for said carbons, the B. E. L. Co. paid the amount into court. The court found that the contract to combine was made for unlawful purposes, and was illegal; that the trust was then insolvent, and its assets including the claim against the B. E. L. Co. insufficient to pay its creditors. *Held*, that, as between the plaintiff and the receiver the latter was entitled to the fund; that plaintiff stood in

the position of a party to an illegal contract claiming a fund, which, if the contract was valid, belonged to the trust combination, and to sustain the action would permit it to escape from the operation of the rule which denies affirmative relief to a party to an illegal contract. *P. C. Co. v. McMillin.* 46

2. As to whether, if the B. E. L. Co. had not paid the funds into court, plaintiff could have enforced a recovery against it, although there was no adverse claimant, *quære.* *Id.*
3. A receiver of an insolvent corporation unites in himself, not only the rights of the corporation, but those of creditors; he may in the interest of creditors, assert a claim which he might be unable to do as a representative solely of the corporation, and he may disaffirm dealings of the corporation in fraud of the creditor's rights. *Id.*
4. Certain creditors of a corporation, whose claims against it were valid and past due, and against which there was no defense, knowing the corporation to be insolvent, and for the purpose of obtaining a preference over other creditors, commenced action against it, the summons being served upon D., one of its directors, under an arrangement with him that he would not disclose the service to the other officers; he carried out the agreement and suffered said creditors to obtain judgment by default. The corporation had no real estate and its personal property was levied upon and sold under execution issued on said judgments. In an action brought by a receiver of the corporation, appointed subsequent to the levy, to have the judgments declared void and set aside, *held*, that the arrangement did not constitute an assignment or transfer; that there was no violation of said statute; and that the action was not maintainable. *Varnum v. Hart.* 101
5. Also *held*, that as the sheriff had seized upon the property and had it in his possession at the time of the appointment of the receiver

the sale was not absolutely void, but at most could be held to be simply irregular. *Id.*

6. A court of original jurisdiction has not power, before judgment in an action in which a receiver *pendente lite* had been appointed on the application of the plaintiff, to make an order continuing the receivership, after judgment shall have been rendered, during the pendency of any appeal which may be taken therefrom. *Colwell v. G. N. Bank.* 408
7. In cases where the provisions of the Code of Civil Procedure, in reference to the appointment of receivers (§ 713) are applicable, and they furnish an adequate remedy, the power of the court is limited by that section, and it must proceed in the manner therein provided, otherwise its orders will be void. *Id.*
8. *It seems* the court may appoint a receiver after judgment, and pending an appeal, although the judgment denies relief to the plaintiff; but the Code contemplates that such application will be made upon the whole case, including the adverse judgment, and does not permit the order to be made in anticipation of the judgment. *Id.*
9. Accordingly *held*, where after trial and a decision adverse to plaintiff in an action in which a receiver *pendente lite* had been appointed, but before judgment, an order was granted continuing the receivership until after the decision of any appeal from the judgment, that the receiver had no authority after the entry of judgment to bring an action to recover a claim, a part of the assets in his hands as receiver; and where the facts appeared in the complaint in such an action, that it was a good ground for a demurrer. *Id.*

RECORDING ACT.

In an action brought to foreclose a mortgage upon certain premises given by M., who held an apparently perfect record title to the same, it appeared that before the

execution of the mortgage, M. conveyed the premises to B. who was in possession, and, with her husband, occupied two rooms in the buildings on the premises; he also kept a liquor store in a part thereof; the other rooms she leased to various tenants, claiming to be the owner, and she collected the rents. Her deed was not recorded until after the giving of the mortgage. *Held*, that B.'s actual possession under her deed, although unrecorded, and its existence unknown to the plaintiff, was sufficient notice to him of her rights to defeat any claim under the mortgage. *Phelan v. Brady.* 587

RECOVERY OF POSSESSION OF PERSONAL PROPERTY.

1. In an action to recover the possession of personal property, when the defendant gives an undertaking for the return of the property, admitting therein that plaintiff has taken the property described in his affidavit and requisition from defendant's possession, he is estopped from denying that he had possession of the property, or any part thereof, at the commencement of the action, or from showing that it was different or other property; he is concluded by the recitals in the undertaking. *Martin v. Gilbert.* 298
2. The effect of the recital, as an estoppel, is not taken away by the fact that after the return of the property to the defendant, he serves an answer, denying that he ever had possession of the property mentioned in the complaint or affidavit accompanying the requisition; nor is its effect disturbed by the provision of the Code of Civil Procedure (§ 1704), giving defendant a right to a return of the property replevied, on giving a bond, although it be not the property described in the requisition. *Id.*
3. *It seems*, where the property replevied is not that described, it is not necessary or proper to recite in the bond that it is. *Id.*
4. In such an action, as plaintiff's affidavit, requisition and the re-

turn of the officer are made by the Code of Civil Procedure (§ 1717) part of the judgment-roll and a copy of them is required to be furnished to the court or referee on trial, it is not necessary to put them formally in evidence in order that the court may consider them.

Id.

REDEMPTION.

1. In an action brought by plaintiff, as receiver of the P. H. S. & I. Co., the complaint alleged in substance that said company executed to defendants' firm, chattel mortgages on all its property, consisting of buildings, machinery, tools, etc.; that default having been made in payment, defendants took possession of the property and sold it at auction, they bidding it in for \$1,000; that none of the property was in view of the persons attending the sale; that it was all put up in a lump and sold together at the request of defendants, although they knew it could be sold in parcels, and greater sums realized for it if so sold; that none of the company's officers were present; that since the sale defendants have claimed to own the property and have sold \$10,000 or \$15,000 of it; that at the time of the sale the property was worth about \$60,000, and the company's indebtedness to defendants did not exceed \$20,000. The relief asked was that defendants be required to account for the value of the property, and after application of sufficient to extinguish the debt secured that plaintiffs have judgment for the balance. A demurrer to the complaint was sustained because of the omission of an averment of a tender to defendants of the amount conceded to be due and unpaid on the mortgages, or an offer to pay that amount on its being ascertained. *Held*, error; that the sale to defendants was voidable and could be vacated and set aside as part of the relief in this action; that the amount received by defendants on the sales made by them was applicable and must be deemed to have been applied upon the mortgages, and the property remaining in their hands to be held as security for the balance

due; that a tender before suit, or an offer in the complaint to pay was not necessary and the omission thereof was only important as bearing upon the question of costs; that the facts alleged in the complaint were sufficient to show a right of redemption in plaintiff and the action should be treated as one to redeem and for such incidental relief as is necessary to accomplish the redemption. *Cassidy v. Witherbee*. 522

2. *It seems* that in such an action payment of the amount found due should be required by the judgment, upon and as a condition of redemption, and that a dismissal of the complaint on default of payment under the judgment would operate as a foreclosure. *Id.*

REFERENCE.

1. Where upon trial before a referee, evidence is received and a question of fact is litigated, without any objection that the fact is admitted and the evidence is inadmissible under the pleadings, the referee is justified in refusing to find in accordance with the alleged admissions, and in determining the question upon the evidence. *Mandeville v. Newton*. 10
2. Although a referee, in his report, places a finding of fact among his conclusions of law, this does not deprive it of its force. *In re Clark*. 427
3. In proceedings under the provisions of the Code of Civil Procedure (§ 2606), giving the surrogate jurisdiction upon the death of an executor to require his executor or administrator to account for and deliver over the trust estate, the referee to whom the matter was referred by the surrogate found as facts that a large amount of money belonging to the estate was received by C., the deceased executor, beyond the sums acknowledged in the account presented by his executrix, specifying various items, including one of \$15,000, received by C. within three months of his death, and "deposited by him in his own

private bank account," and that "there was no evidence of the disposition of said funds" by him, with certain specified exceptions; also, that the accounting executrix, although in possession of C.'s bank and check-books, refused to produce them. As conclusions of law, the referee found that there being no evidence of the disposition of said funds by C., they are presumed to have come into the possession of his executrix; and that said presumption was strengthened by the deposit by C. to his private account, and the refusal of his executrix to produce such book, and that a decree should be entered against her individually and as executrix for the sums due. Upon the hearing before the surrogate he modified the finding that the moneys received by C. were deposited by him in his own private account, by substituting a finding that the moneys were deposited to his own individual credit and he sustained exceptions to the conclusions of law, so found, as to the presumption that the fund came into the possession of the executrix, and to the direction of judgment against her individually, and he awarded judgment against her as executrix simply; the report in all other respects was confirmed. The General Term affirmed the decree on the ground mainly that there was no finding by the referee that the fund belonging to the estate received by C. passed into the hands of his executrix. *Held*, error; that the finding as to the presumptions were of fact, not of law, and amounted to a finding that the fund which C. received passed on his death into the actual possession of the executrix; and that the conclusion as to her individual liability followed as a conclusion of law. *Id.*

4. In a proceeding by reference to ascertain the damages sustained by a party in consequence of an injunction restraining him from exercising some legal right, it is proper to allow as part of the damages the expenses incurred upon the reference. *Holcomb v. Rice.* 598

5. The allowance of costs, upon a

reference under a statute of a disputed claim against an estate, is within the discretion of the court below, and is not reviewable here. *Hauxhurst v. Ritch.* 621

RELEASE.

— When contractor, upon receiving final payment under his contract, executes release of all causes of action, damages, etc., this is a good defense to any claim for damages arising under contract.

See Phelan v. Mayor, etc. 86

REMEDIES.

When an error has been made in the form of a judgment, by which its scope has been enlarged or its amount increased beyond that plainly authorized by a verdict, referee's report or decision of the court, the judgment is not void or inoperative, and no question is presented for the consideration of the court on appeal; the error is an irregularity merely, which must be corrected, if at all, by motion in the court of original jurisdiction, to be made within one year after notice of the judgment or filing of the judgment-roll. (Code Civ. Pro. §§ 724, 1282.) *C. E. Bank v. Blye.* 414

REPLEVIN.

See RECOVERY OF POSSESSION OF PERSONAL PROPERTY.

RESCISSION.

Where a contract is rescinded while in course of performance, no claim in respect of performance, or of what has been paid or received thereon may thereafter be made, unless expressly or impliedly reserved upon the rescission. *McCreery v. Day.* 1

RIOTS.

In an action, under the act of 1855 (Chap. 428, Laws of 1855), to recover compensation for property destroyed in consequence of a mob

or riot, it appeared that an action was begun in the County Court for the same cause within the three months limited by said act, in which the complaint was dismissed for want of jurisdiction in that court to entertain actions brought to recover a sum exceeding \$1,000; thereafter, this action was commenced, but after the lapse of the statutory period. *Held*, that the action was not maintainable; that as it was brought under special law and was maintainable solely by its authority, the limitation was so incorporated with the remedy given as to make it an integral part of it and was a condition precedent to the maintenance of the action at all; and that the provisions of the Code of Civil Procedure (§ 405) providing that when an action is commenced within the time limited and is terminated "in any other manner than by voluntary discontinuance, dismissal for neglect to proceed, or a final judgment on the merits, the plaintiff may commence a new action for the same cause within one year after" such determination, did not apply. (See § 414.) *Hill v. Suprs. Rens. Co.* 344

SALARY.

— *Of county treasurer of Erie county, how fixed.*
See *Suprs. Erie Co. v. Jones.* 339

SALES.

In an action to recover damages for the alleged conversion of a quantity of lumber, which had been transferred to plaintiff by the firm of G. & E. H., it appeared that said firm, having contracted to build two boats for defendant, ordered lumber of it; the order specified kinds and quantities, but no prices; the lumber was forthwith delivered, accompanied by a bill, in which the firm was described as debtors to defendant for the lumber, and the quantity, kind and price were set forth. Defendant was not required by the contract to furnish any lumber, nor were the contractors required to purchase any from it. It did not

appear there were any negotiations between the parties prior to the delivery of the lumber as to the terms and conditions on which the lumber was to be furnished. Defendant proved that it kept on hand lumber for building boats, including pieces specially shaped, which is used for that purpose, and also furnished to builders having contracts with it, but only to be used in boats built for it, and that the value of the lumber so furnished was deducted from the price of the boat in which it was used, which custom was known to G. & E. H. At the close of the evidence a motion by defendant's counsel for a nonsuit was granted. *Held*, error; that the question whether there was a bailment or a sale was for the jury. *Crosby v. Pres., etc., D. & H. C. Co.* 334

SERVICE AND PROOF OF.

Plaintiff in 1836 joined with her husband in a mortgage upon his land. In 1838 they were both made parties to a suit for the foreclosure of the mortgage. No copy of the writ of subpoena was served upon her; one was served upon the husband, and one delivered to him with the request to hand it to her; she was at the time under age. A judgment of foreclosure and sale was entered, under which the premises were sold. The husband died in 1882. In an action to recover dower, *held*, that under the rule and practice in chancery proceedings in force at the time of the foreclosure, personal service of the writ upon plaintiff was not necessary, but service on the husband was a good service on both, and this was so although she was at the time under age; and that, therefore, the action was not maintainable. *Feitner v. Lewis.* 131

SET-OFF.

1. In an action to foreclose a mortgage held by plaintiffs, as assignees for the benefit of creditors of the mortgagees, defendant M., who had purchased the premises subject to the mortgage.